Supreme Court, U. S.
FILED
NOV 28 1975
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-774

BIG RIVERS ELECTRIC CORPORATION
KENTUCKY POWER COMPANY and
KENTUCKY UTILITIES COMPANY,
Petitioners,
v.
ENVIRONMENTAL PROTECTION AGENCY,
RUSSELL E. TRAIN, ADMINISTRATOR,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

WILSON W. SNYDER
300 Madison Avenue
P.O. Box 2088
Toledo, Ohio 43603
Attorney for Petitioners

Of Counsel:

A. JOSEPH DOWD
2 Broadway
New York, New York 10004

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
962-8745—962-8732

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Petitioners Big Rivers Electric Corporation, Kentucky Power Company and Kentucky Utilities Company, respectfully pray that a writ of *certiorari* issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on September 4, 1975.

OPINION BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on September 4, 1975. This petition for *certiorari* was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254 (1).

QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Sixth Circuit erred in construing the statement of this Court in *Train v. NRDC*, 421 U.S. 60 (1975), that emission limitations "are regulations of the composition of substances emitted" (at 78) as requiring affirmance of the disapproval by the Administrator of the Environmental Protection Agency of the alternate control strategy provision in the Kentucky air pollution implementation plan.

2. Whether the Clean Air Act authorizes the Administrator of the U. S. Environmental Protection Agency to deprive a state of the right to choose its own strategy to satisfy the standards of §110(a)(2) of that Act (42 U.S.C. §1857c-5(2)) and comply with the national standards for ambient air.

3. Whether the Clean Air Act authorizes the Administrator of the U. S. Environmental Protection Agency to

disapprove an alternate control strategy in a state air pollution control plan on the grounds that it could be construed to permit intermittent control measures under circumstances where constant emission controls were available.

4. Whether the Administrator of the U. S. Environmental Protection Agency acted arbitrarily, capriciously and unlawfully in deleting Kentucky air pollution regulation AP-1 Section 1(b) providing for an alternate control strategy as a part of his act in approving the Kentucky implementation plan.

STATUTORY PROVISIONS INVOLVED

The Clean Air Act amendments of 1970, 42 U.S.C. §1857a-j (the "Clean Air Act").

STATEMENT OF THE CASE

In December of 1973, the Governor of Kentucky resubmitted[1] the Kentucky air pollution control implementation plan to the Administrator of the U. S. Environmental

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[1] In January of 1972 the Kentucky Air Pollution Control Commission adopted an air pollution control implementation plan pursuant to Section 110 of the Clean Air Act as amended and same was approved (with one exception not relevant here) by the Administrator on May 31, 1972 without having given prior notice and opportunity to comment. On June 28, 1973, the Sixth Circuit Court vacated the Administrator's approval for failure to comply with Section 553 of the Administrative Procedure Act, *viz.*, to take comments, data and other evidence from interested parties and to express the basis for administrative actions. *Buckeye Power Co., et al. v. Environmental Protection Agency*, 481 F.2d 162 (6th Cir. 1973).

Protection Agency ("Administrator"). In addition to containing specific limitations on the amount of sulfur dioxide that a given source could emit, the plan contained an important alternate control strategy provision designated AP-1 Section 1(b), which read as follows:

> "Where it is demonstrated to the satisfaction of the Commission that an air contaminant source can apply *an alternate control strategy which will provide for achievement and maintenance of applicable ambient air quality standards,* the Commission may, under such terms and conditions as it deems appropriate, authorize such a control strategy after a public hearing." (Emphasis added.)

On August 9, 1974, the Administrator approved the plan *except for the above provision.* The reason given is as follows:

> "In his original approval of May 31, 1972 (37 FR 10842), the Administrator took note of the fact that a number of State plans contained optional control regulations of this sort. At that time, the Administrator took no action on these regulations, but advised the States that any application of them to specific sources would constitute a plan revision. *It is now his opinion that this provision of the Kentucky plan—if not specifically disapproved—could be construed to permit intermittent control measures under circumstances where constant emission controls were available. To eliminate the possibility of such an interpretation, section 1(b) of AP-1 is disapproved as failing to meet the requirements of 40 CFR 51.12."* (39 Fed. Reg. 29358 (1974 App. 128a)) (Emphasis added.)

Certain electric utilities (the "Utilities") and the Tennessee Valley Authority ("TVA"), serving many thousands of customers in Kentucky, filed petitions with the United States Court of Appeals for the Sixth Circuit ("Court of Appeals") to review this action of the Administrator pursuant to the Clean Air Act (42 U.S.C. §1857h-5(b)(1)). The Court of Appeals denied the petition for review on the surprising basis of a definition in the very recent decision of this Court in *Train v. NRDC,* 421 U.S. 60 (1975) (*"Train* case"), which stated that *emission limitations "are regulations of the composition of substances emitted."* (Slip opinion at 16-17) (Emphasis added.) The Court of Appeals stated:

> "Thus the question in this case is whether the emission limitations requirement of Section 110(a)(2)(B) was satisfied by the Kentucky Plan in view of its provision permitting an air contaminant source to apply an alternate control strategy. If the requirement was satisfied, the Administrator was required to approve the Plan as submitted. In *Train v. NRDC,* the Supreme Court provided a definition of 'emission limitations' as follows:
>
> As we have already noted, primary ambient air standards deal with the quality of outdoor air, and are fixed on a nationwide basis at levels which the Agency determines will protect the public health. It is attainment and maintenance of these national standards which §110(a)(2)(A) requires that state plans provide. In complying with this requirement a State's plan must include 'emission limitations,' which are regulations of the composition of substances emitted into the ambient air from such sources as power plants, service stations, and the like. They are the speci-

fic rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards. *Id.* at — (slip opinion at 16-17).

"The key word in this definition is 'composition.' The pertinent definition of 'composition' in *Webster's Third New International Dictionary* appears to be 'the nature of a chemical compound or mixture as regards the kind and amounts of its constituents. . . . ' Under this definition a rule or regulation pertaining to sulfur dioxide or any other contaminant, would qualify as an emission limitation only if it regulates the *amount* of that kind of material which may be included in the emission from a given source.

. . . .

" . . . The Administrator determined that the provision of the Kentucky Plan which he disapproved was susceptible of a construction which would permit state approval of measures not within the definition of 'emission limitations' without a showing that measures which satisfy that definition were unavailable. We find that the Administrator acted within the scope of his authority, that his decision was not arbitrary and did not constitute an abuse of discretion." (Opinion at 9-12)

Petitioners herein seek a writ of *certiorari* for this Court to review that decision.

REASONS FOR GRANTING THE WRIT

1. THE DECISION BELOW ERRONEOUSLY CONSTRUES A DEFINITION IN THE OPINION OF THIS COURT IN THE TRAIN CASE AS BEING DECISIVE OF AN ISSUE OF NATIONWIDE IMPORTANCE WHICH WAS NOT EVEN INVOLVED IN THAT CASE.

The Court of Appeals has construed the *Train* case as in effect *deciding an issue which was clearly not before the Supreme Court for decision.*

The *Train* case involved a review of *only one issue* decided by the U. S. Court of Appeals for the Fifth Circuit, *NRDC v. EPA,* 489 F.2d 390 (5th Cir. 1974). The Georgia implementation plan which was the subject matter of that case involved certain regulatory measures for attainment of ambient sulfur dioxide standards. There were limitations on the permissible sulfur content of the fuel used by stationary sources and quantitative sulfur dioxide emission limits were prescribed which varied according to a source's stack height. It also contained certain variance provisions. One of the attacks on the plan in the Fifth Circuit was the method of prescribing emission limitations. A second attack was upon the variance provisions. *The circuit court's decision on the variance provisions was the only issue as to which the agency petitioned for certiorari and the only one decided by the Supreme Court. There was no decision on alternate emission controls.* Thus, the decision in the *Train* case states:

" . . . Its plan provided for immediately effective categorical emission limitations, but also incorporated a variance procedure whereby particular sources could obtain individually tailored relief

from general requirements. This variance provision, Ga. Code Ann. §§88-912, was one of the bases upon which the Agency's approval of the Georgia plan was successfully challenged by respondents in the Court of Appeals. *It is the only aspect of that court's decision as to which the Agency petitioned for certiorari.*" (Opinion at 7-88) (Emphasis added.)

Thus even though the *Train* case specifically only dealt with and decided one issue relating to variances, the Sixth Circuit Court (as shown by the portion of the opinion quoted above) viewed *11 words* in the opinion, *i.e.*, "'emission limitations', which are regulations of the composition of substances emitted.", as *requiring* a decision that the Administrator was justified in disapproving an alternate control strategy provision which he thought could be construed to permit intermittent control measures. *The Train case expressly did not decide any issue relating to alternate control strategies or intermittent controls.* By reason of the limited appeal in that case *these issues remain open for decision by the Supreme Court* and are of such magnitude that they should not be deemed to have been determined in advance by an 11-word definition in an opinion which did not address this issue.

The foregoing erroneous construction of the *Train* case should not be left standing. To do so would give the *Train* case the unintended effect of having conclusively decided one of the most important issues which exists today relating to the proper construction of the Clean Air Act. Such issue should be decided by the Supreme Court in this case where both sides can be fully presented.

It is urgent that the misinterpretation and misapplication of the *Train* case be cleared up at this time by the Supreme Court.

2. THE DECISION BELOW DEPRIVES THE STATES OF THE VITAL RIGHT, WHICH THE SUPREME COURT RECOGNIZES IS RESERVED TO THEM BY THE CLEAN AIR ACT, TO CHOOSE WHATEVER MIX OF EMISSION LIMITATIONS THEY DEEM BEST SUITED TO THEIR PARTICULAR SITUATION.

While, as stated above, the *Train* case decided only the issues relating to variances, one portion of the opinion on variances involved states' rights versus federal rights under the Clean Air Act. This states' rights portion of the opinion does have applicability to any case involving such state-federal conflict. This Court held in the *Train* case:

> "The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under §110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of §110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. §110(c). Thus, so long as the ultimate effect of the State's choice of emission limitations is compliance with the national stand-

ards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation." 421 U.S. at 79.

The states' rights issue is one of paramount importance in this case regarding the alternate control strategy provision in the Kentucky plan. Kentucky had done exactly what the Clean Air Act permitted it as a state to do—it reserved the right to adopt whatever mix of emission limitations it deemed best suited to its particular situation to achieve and maintain the applicable ambient air qualiy standards.

Some examples to illustrate the foregoing are as follows: A state might deem it desirable to set a very strict emission limitation of general applicability on sulfur dioxide such as 1 lb. per million BTU. If low sulfur coal (about .6% sulfur) were available, such coal would have to be used at all times in a coal-burning boiler to meet such limitation. However, the state also might recognize that at some locations and under certain circumstances the strict emission limitation was not necessary to attain and maintain the ambient sulfur dioxide standard. In such instances it might deem it wise to permit an alternate control strategy involving a less stringent emission limitation. At such location an emission limitation of 4 lbs. per million BTU might be adequate to meet the ambient standards. Under such circumstances an alternate control strategy of burning a coal of a higher sulfur content (say 2.4% sulfur) might be permitted and still adequately comply with the emission limitation and meet the ambient standard. At still another location, under a different set of circumstances, where meteorological conditions might vary, an emission limitation of 4 lbs. per million BTU might be adequate during most of the year to meet the ambient requirement but at other times an emission limitation of 1 lb. per million BTU might be necessary. Under these conditions a coal-fired electric utility boiler's alternate compliance strategy might include: (a) switching to a low sulfur fuel during those periods, (b) shifting the load to boilers in other locations, or (c) possibly purchasing power from other sources. *The modeling to determine the particular emission limitation figure necessary to meet the ambient requirements should properly take into account stack height.* The Georgia plan involved in the Fifth Circuit case did precisely that and the court struck it down. As stated above, this issue was not brought before the Supreme Court.

In all instances discussed above there would be emission limitations and the ultimate effect would be compliance with the national standards. In all instances there would be an exercise of the right of the state to choose its own mix of emission limitations under the Clean Air Act, as construed by the Supreme Court. *In all instances such regulations would also regulate the composition (i.e., sulfur dioxide) of substances emitted.* The foregoing would be true even when a so-called intermittent control strategy is permitted. While the *numbers might vary*, there would always be some type of emission limitations. There is nothing in the Clean Air Act or the Supreme Court's construction of it which requires that the emission limitations *be the same* at all times and under all circumstances. The result—meeting the ambient standards—is the test emphasized by the Supreme Court.

Even if it were theoretically possible to devise a so-called intermittent control strategy which the Administrator might find did not comply with the Clean Air Act, he had no right to disapprove *in advance* a provision such as

was contained in the Kentucky plan. There are many strategies which would comply and there is nothing in the Clean Air Act or the Supreme Court's construction thereof which authorizes the Administrator to deprive the state of the right to adopt whatever mix of emission limitations it deems best suited to its particular situation simply because he fears it might be contrary to law. If a new strategy were allowed by the state as an amendment to the plan, the Administrator would have ample opportunity to pass his judgment on its legality when the amendment was submitted to him. That is the time for such a decision, not an advance speculation as to what might be done.

The need for this Court to clarify the right of a state to have flexibility in choosing its own mix of emission standards is emphasized by the conflict which exists in the decisions of the circuit courts relating to the economic and technological feasibility of meeting an *inflexible* single emission standard. A recent case decided by the United States Court of Appeals for the Third Circuit, *Duquesne Light Company v. EPA*, — F.2d —, 8 ERC 1065 (3rd Cir. 1975), recognized these problems. In that case the petitioners claimed that the approval by the Administrator of the EPA of the sulfur oxide emission limitations of the Pennsylvania implementation plan was arbitrary and unreasonable because it was not economically and technologically feasible to meet them. The court remanded the matter to the Administrator for further consideration of those issues. In regard to the economic feasibility, the court stated:

> "Thus the Administrator's statement in support of the plan merely declares that the costs should be passed on to the utilities' customers. He makes no attempt to evaluate the severity of the problems

> the companies have pointed to with respect to the unfavorable impact such increases may have on the economic structure of their service territories. A 23% or 35% increase may reasonably be expected to raise the cost of living and seriously diminish the level of business activity, thus increasing the incidence of unemployment and occasioning considerable hardship to many people. The EPA has not sought to controvert the inference of a disadvantageous impact on the regional economy, nor has it sought to measure the magnitude of such effects." 8 ERC 1071.

The court also found that there was a lack of evidence of technological feasibility.

> " . . . The present record does not, however, seem to contain the technical data necessary for a rational determination that past experience with flue gas desulfurization devices, under conditions admittedly at variance from those that will be experienced by the protesting utilities, provides a sufficient basis for widespread installation of scrubbers. There is little to specify at what pace the technology will develop, and there is also a paucity of testimony regarding the cost of adjustments necessary to render currently produced equipment effective and reliable. Without some evidence that such technical data was available to the Administrator when he approved the emission limitations, we would be hesitant to conclude that he had not acted arbitrarily." 8 ERC 1074.

The conflict in other decisions on these issues is reviewed by the court:

"36. The Court is cognizant that in Essex Chemical Corp. v. Ruckelshaus, 486 F.2d 427, 440 (1973) the District of Columbia Circuit, in approving the federal emission standards for new sources of pollutants held that the availability of flue gas desulfurization devices for coal-burning power plants was adequately demonstrated. That decision was based on a different record from that presently before this Court. In promulgating those emission limitations the Administrator had pointed primarily to the Meramac No. 2 station of the Union Electric Co. and the Lawrence No. 4 unit of the Kansas Power and Light Co. as demonstrating the availability of scrubber technology. The Arlington hearings, however, established that neither of those is currently regarded as a successful operation, and the Meramac station has been abandoned.

"In Commonwealth v. Pennsylvania Power Co., 337 A.2d 823 (1975), the Pennsylvania Supreme Court affirmed a ruling that Pennsylvania Power was not in contempt of court for not complying with the Pennsylvania implementation plan in 1972. The ruling is based in part upon the Supreme Court's affirmation of the trial court's conclusion that in 1972 scrubbers had not been shown to be technologically feasible. The Pennsylvania courts did not intimate any views regarding the feasibility of scrubbers at any later date.

"A hearing panel of the Ohio EPA, see footnote 26, has determined after an adversary hearing that scrubbers are not presently available for installation by coal-burning utilities. That decision has been stayed pending review by the director of the state EPA.

"The Seventh Circuit in Indiana & Michigan Power Co. v. Environmental Protection Agency, 509 F.2d 839, 843 (1975), has upheld the Administrator's approval of the Illinois and Indiana sulfur oxide emission restrictions in spite of allegations that meeting such limitations is technologically infeasible. That Court decided, however, that, contrary to our decision in *Getty Oil, Duquesne Light I,* and *St. Joe Minerals,* the Administrator is not required to evaluate the technological and economic feasibility of the plan before approving it. Rather, that court held, those factors should be considered in enforcement proceedings.

"An Illinois appellate court, however, in Commonwealth Edison v. Pollution Control Board, 25 Ill. App. 3d 271, 323 N.E. 2d 84 (1975), has held that state's sulfur oxide emission controls arbitrary and unreasonable, because, *inter alia,* scrubbers had not been demonstrated to be workable." 8 ERC n. 1074.

The need for flexibility in a state plan was recognized by the Ninth Circuit in the case of *NRDC v. EPA,* 507 F. 2d 905 (9th Cir. 1974):

> ". . . As long as a possible variance from a state plan will not preclude the attainment or maintenance of such standards, we discern no legislative intent to commit a state, in toto, to its initial plan, without any flexibility whatsoever. . . . " (507 F.2d 913.)

The need for flexibility in a state plan to avoid overkill as recognized in the *Train* case and other circuit court cases reviewed above is in fact mandated by the Clean Air

Act, Section 110(a)(2)(B) (42 U.S.C. §1857c-5(a)(2)(B)). That section provides that the Administrator must determine whether a plan "includes emission limitations . . . and such other measures as may be *necessary* to insure attainment and maintenance of such primary or secondary standard." (Emphasis added.)

In one sense the "as may be necessary to insure attainment" language restates the requirement of subparagraph (A) that the provisions of the plan must be such as to insure attainment of the standards. But this aspect of subparagraph (B) would be totally redundant if it did nothing more than state that plan provisions must assure attainment of the standards. Both logic and common sense would suggest that subparagraph (B) was intended to impose some additional requirement, and the statutory language supports this conclusion, for the word "necessary" includes the connotation that a state implementation plan may not be approved by the Administrator if it contains emission limitations or other controls that are not required to insure attainment of the standards. In short, if a particular emission limitation or other control could be shown to be *overly restrictive* and thus *not necessary* to assure attainment, then it would not fall within the precise wording of Section 110(a)(2)(B).

Another section of the Act indicating the need for flexibility is Section 110(a)(2)(A)(i) (42 U.S.C. §1857c-5(a)(2)(A)(i)), which requires a plan to provide for the attainment of the primary standards not later than three years from the date of its approval and within a reasonable time for attainment of the secondary standards. These time requirements necessitate taking into consideration the technological and economic feasibility of compliance. Such considerations in turn mandate flexibility of compliance strategies.

While an extensive review of legislative history would be too lengthy for this petition, if *certiorari* is granted petitioners will show that such history supports their position.

The foregoing clearly shows the right, and in fact the duty, of states to adopt whatever mix of emission limitations they deem necessary, but not more than necessary in their particular situation, to meet the ambient standards. The decision below construing the *Train* case as depriving all 50 states of this right and obligation should be reviewed by this Court.

3. THE MAGNITUDE OF THE IMPACT ON THE NATION OF THE ISSUES INVOLVED IN THIS CASE MAKES THEIR RESOLUTION BY THE SUPREME COURT URGENT.

This is not just a case which affects the rights of the parties involved. The Clean Air Act has an enormous impact on every person in this country and on our troubled energy-dependent economy. Nearly every person in the country is a user of electricity and it is a vital energy source to help achieve our national goal of energy self-sufficiency. A uniform and proper construction of that Act by the Supreme Court is therefore of very great importance.

The staggering cost to the consumers of electricity of the overkill which would result if the states were not permitted to adopt whatever mix of emission limitations they deem best suited to their particular situation is shown by published estimates in this regard. A recent study performed by the Federal Energy Administration (FEA) estimates the average capital costs for flue gas desulfurization (FGD) systems as $100 per kilowatt.[2] The final Re-

[2] Office of Fuel Utilization, Federal Energy Administration, *Draft Environmental Statement, Coal Conversion Program, Energy Supply and Environmental Coordination Act of 1974*, Section 2, DES 75-1, January 31, 1975, page 183.

port of the Sulfur Oxide Control Technology Assessment Panel (at page 8) (SOCTAP) estimates that by the end of 1977 the equipped utility capacity may be up to 80,000 Mwe (80,000,000 kilowatts). This would represent an expenditure of over $8 billion and would involve only about 40% of the utility heat required from coal in that year. The SOCTAP report further estimates that at least 75% of the coal-fired capacity conceivably could be equipped with scrubbers by 1980. Such an increase would correspondingly magnify the 1977 figures. The FEA has also estimated the total annual cost of FGD systems to be on the order of 5.5 mills per kilowatt hour.[3] In a state such as Kentucky this could result in as much as a 46% increase above the rate paid by consumers of electricity produced by the average Kentucky plant in 1973.[4] Similar examples could be presented for other states.

The inflationary effect of such huge expenditures and resulting rate increases is indeed alarming. The multiplier effect of passing on increased costs of electricity incurred in many manufacturing processes which are heavy users of electricity makes the picture even darker. Certainly the right of a state to avoid overkill and eliminate needless expenditures without endangering the ambient standards is vital.

In our nation's struggle to avoid the perils of being dependent on foreign sources of energy, it is recognized that our abundant supply of coal is our most valuable resource. To force electric ultilities to abandon much of the coal re-

[3] Office of Fuel Utilization, Federal Energy Administration, *Draft Environmental Statement, Coal Conversion Program, Energy Supply and Environmental Co-ordination Act of 1974*, Section 2, DES 75-1, January 31, 1975, page 178.

[4] Edison Yearbook, 1973, Tables 225, 365.

sources of the eastern half of the country in favor of oil, gas and low sulfur western coal is in direct conflict with that goal. This result is forced by the prohibitive costs and unproven reliability of so-called scrubbers as a means of attempting to meet unnecessarily strict and inflexible sulfur dioxide emission regulations if higher sulfur eastern coal is used. Also inherent in this shift of fuels is the dislocation of and hardship to thousands of workers and their families who now mine much of the national coal supply.

If the states are permitted the flexibility to provide for alternate control strategies best suited to their particular situations, the disastrous consequences summarized above can be avoided. *It is also of paramount importance to emphasize that such flexibility will not prevent the attainment and maintenance of ambient standards—the important factor emphasized in the Train case.* On the contrary, the standards will be achieved and maintained. Only overkill will be prevented.

It is apparent that this question will continue to be brought before the federal courts. For example, in addition to the cases already discussed, the case of *Kennecott Copper Corp. v. Train, case* #75-1335, (9th Cir. Filed Feb. 11, 1975) is presently pending in the Ninth Circuit and deals with issues which are very similar to the case at bar. In *Kennecott,* the Administrator of the EPA disapproved a state implementation plan as it related to smelters and promulgated its own regulation requiring more strict emission reductions and limitations than Nevada had originally imposed. While the state regulation did require the maintenance of ambient standards, it also allowed intermittent control systems as a means of attaining and maintaining ambient standards. Using a rationale similar to that applied to the Kentucky plan, the Administrator disapproved the Nevada plan on the basis that constant control strategies

must be used whenever possible in reliance on the Fifth Circuit decision in *NRDC v. Train.* The Ninth Circuit has not yet issued an opinion. However, regardless of the result, the resolution of these issues is needed by the Supreme Court. If the Ninth Circuit decides in favor of alternate control strategies, there will be a conflict of circuit court decisions, and, if the decision is similar to that of the Sixth Circuit, the error of that case will be compounded.

As indicated above, if *certiorari* is granted, Petitioners in this case will show that the language of the Clean Air Act itself, as well as its legislative history clearly permit an alternate control strategy such as the one in the Kentucky plan. In sum, we submit that the decision in the case at bar as well as the second issue in the Fifth Circuit's decision in the *Train* case (which was not appealed to or decided by this Court) were wrong. The nature of the subject matter causes such error to have the far-reaching impact discussed above.

A definitive interpretation of the Clean Air Act concerning the issues involved will serve the national interest in a most significant way.

CONCLUSION

Clearly, this case involves an important question of federal law which has not been, but should be, settled by this Court. The misinterpretation and misapplication of this Court's decision in the *Train* case, the nationwide applicability of the issues, the importance of preserving rights of states to have flexibility in implementation plans, the far reaching economic impact of such plans, and their relationship to the energy crisis, as well as the need for uniform interpretation, make it particularly important that this petition for a writ of *certiorari* be granted.

Respectfully submitted,

November 26, 1975.

WILSON W. SNYDER
300 Madison Avenue
P.O. Box 2088
Toledo, Ohio 43603
Attorney for Petitioners

Of Counsel:

A. JOSEPH DOWD
2 Broadway
New York, New York 10004

APPENDIX

OPINION

No. 74-2015

No. 74-2020

UNITED STATES COURT OF APPEALS

For the Sixth Circuit

Big Rivers Electric Corporation, City Utility Commission of the City of Owensboro, Kentucky, East Kentucky Rural Electric Cooperative Corporation, Kentucky Power Company, Kentucky Utilities Company, The Utility Commission for the City of Henderson, Kentucky Municipal Power and Light System, *Petitioners,* Commonwealth of Kentucky, Peabody Coal Company, *Intervenors,* v. Environmental Protection Agency, Russell E. Train, Administrator, *Respondents.*	Petitions for Review of Action of the Administrator of the Environmental Protection Agency.

Tennessee Valley Authority,
Petitioner,
v.
Environmental Protection Agency and Russell E. Train, Administrator,
Respondents,
National Resources Defense Council, Inc.,
Intervenor,
Ed W. Hancock, Attorney General of the Commonwealth of Kentucky,
Respondent.

Decided and Filed September 4, 1975.

Before: Celebrezze, Miller and Lively, Circuit Judges.

Lively, Circuit Judge. The underlying question in this case is whether the Administrator of the Environmental Protection Agency (EPA) properly disapproved a state regulation promulgated under the Clean Air Act Amendments of 1970, 42 U.S.C. §§ 1857a-j (Supp. 1975), which would have authorized coal-burning plants ("sources" in the Act) to employ "alternate control strategies" for the control of air pollution by sulfur oxide gases without showing that constant emission controls of such pollutants are unavailable. Constant emission controls are achieved primarily by the installation of "scrubbers." The alternate control method employed by the petitioners consists principally of the use of intermittent emission limitations systems. The separate petitions for review filed by the Tennessee Valley Authority (TVA) and several electrical utili-

ties companies operating in Kentucky (the Utilities) were consolidated for hearing. At issue is the action of the Administrator in disapproving a portion of the Kentucky "implementation Plan for the Attainment and Maintenance of the National and State Ambient Air Quality Standards" (Kentucky Plan). The portion which was disapproved provided as follows:

> Where it is demonstrated to the satisfaction of the [Kentucky Air Pollution Control] Commission that an air contaminant source can apply an alternate control strategy which will provide for achievement and maintenance of applicable ambient air quality standards, the Commission may, under such terms and conditions as it deems appropriate, authorize such a control strategy after a public hearing. Ky. Air Pollution Control Reg. No. AP-1, § 1 (1)(b).

Original EPA approval of the entire Kentucky Plan was vacated by this court for failure to adhere to the requirements of the Administrative Procedure Act. *Buckeye Power, Inc.* v. *EPA,* 481 F.2d 162 (6th Cir. 1973). Subsequently the Kentucky Plan, with the exception of Section 1(1)(b), *supra,* was approved on August 9, 1974. The Acting Administrator of EPA stated with reference to Section 1(1)(b), his opinion "that this provision of the Kentucky plan—if not specifically disapproved—could be construed to permit intermittent control measures under circumstances where constant emission controls were available." To eliminate the possibility of such an interpretation the section was specifically disapproved for failure to meet the requirements of controlling federal regulations.

The Utilities and TVA maintain that EPA's disapproval of the quoted provision of the Kentucky Plan will prevent them from meeting the established air quality standards

by use of "intermittent emission limitation" systems which are much less costly than scrubbers. The petitioners argue that the purpose of the Clean Air Act is to establish national standards of air quality within a scheme of dual responsibility which leaves to the States the task of formulating actual emission standards. They maintain that Congress has made air pollution control a partnership venture in which EPA sets standards and each State determines the methods best suited for reaching those standards within its geographical boundaries. Thus they argue that the Administrator has exceeded his statutory authority in disapproving a portion of the Kentucky Plan dealing only with a permissible method of controlling air quality while finding that the Plan otherwise met the national standards. In the alternative they contend that even if the Administrator possessed such power, his action in disapproving the Kentucky provision for an alternate strategy was arbitrary and constituted an abuse of discretion.

Jurisdiction

Though the question has not been raised by any of the parties there is an issue with respect to the court's jurisdiction to consider these petitions. Judicial review of actions of the Administrator is provided for in Section 307 of the Act, 42 U.S.C. § 1857h-5(b)(1) as follows:

> . . . A petition for review of the Administrator's action in approving or promulgating any implementation plan under section 1857c-5 of this title . . . may be filed only in the United States Court of Appeals for the appropriate circuit. . . .

There is no statutory provision for review of an action *disapproving* a plan or portion thereof because disapproval is not a final administrative action. *Utah International, Inc.*

v. *EPA*, 478 F.2d 126 (10th Cir. 1973). However, all parties including the Administrator have treated his action as a final approval of the Kentucky Plan with the disapproved portion eliminated, and we treat the proceedings as a petition for review of the approval of the Plan.

The Mootness Issue

The Commonwealth of Kentucky, by its Attorney General, has been permitted to intervene in these proceedings, and has made a motion to dismiss them as moot. EPA has also filed a motion to dismiss on the same ground. The Kentucky General Assembly in 1974 required administrative agencies of the Commonwealth, including the Department for Natural Resources and Environmental Protection (the Department), to file all their regulations by July 1, 1975. On March 1, 1975, the Department caused its proposed regulations to be printed in the *Administrative Register*, the official compilation of such regulations. On July 2, 1975, final review of the regulations took place and the new regulations became effective as of June 6, 1975. The current air pollution control regulations do not contain the language of Section 1(1)(b) of the former regulation or any equivalent provision which would permit approval by the Department of alternate control strategies. Thus it is argued that there is no case or controversy to be decided since the questioned regulation is no longer in force.

The jurisdiction of federal courts is limited by Article III of the Constitution to consideration of actual cases and controversies. Thus federal courts do not render advisory opinions or continue to consider an action if the controversy which underlies the action ceases to exist prior to its termination. See *United States* v. *Hamburg-American Co.*, 239 U.S. 466, 475-76 (1916); *California* v. *San Pablo*

& Tulare R. R., 149 U.S. 308, 314 (1893). For more recent Supreme Court pronouncements on the general doctrine of mootness, see *Roe* v. *Wade,* 410 U.S. 113, 125 (1973); *North Carolina* v. *Rice,* 404 U.S. 244, 246 (1971).

The mootness doctrine has limited application in at least two related types of cases. One type is specifically concerned with administrative orders. This limitation was first enunciated in *Southern Pacific Terminal Co.* v. *ICC,* 219 U.S. 498 (1911), which involved preferential freight rates. The terminal company instituted an action to challenge an order of the ICC which prohibited the granting of such preferences. The order expired before the case reached the Supreme Court, and the ICC argued that the case had become moot. The Court held otherwise, stating —"The questions involved in the orders of the Interstate Commerce Commission are usually continuing (as are manifestly those in the case at bar) and their consideration ought not to be, as they might be, defeated, by short term orders, capable of repetition, yet evading review. . . . " *Id.* at 515. This is a proper case for application of the *Southern Pacific Terminal* doctrine since it concerns an order which is clearly capable of repetition, but which would evade review if the principle of mootness were strictly applied.

The other class of cases which requires relaxation of the mootness principle consists of those in which persons other than the parties to the action have a tangible interest or are likely to be directly affected by the outcome of the litigation. Cases which involve public interest, or rights of the public generally, are not necessarily rendered moot by an act which puts an end to the particular controversies which precipitated them. *United States* v. *W. T. Grant Co.,* 345 U.S. 629 (1953). The fact that one party to whom an administrative order is directed elects to comply with it

should not deprive others who claim to be adversely affected by the order from contesting it. *Cf. Super Tire Engineering Co.* v. *McCorkle,* 416 U.S. 115, 122 (1974). The public interest in determination of the question in this case is obvious. There is a subsisting controversy between the petitioners and EPA over the authority of the Administrator of that agency. The action of the Kentucky Department in no way answered the questions which this case raises concerning the Administrator's authority.

The motions to dismiss for mootness are denied.

The Merits

The history of the Clean Air Act Amendments of 1970 (the Act) and its scheme for achieving and maintaining air quality through joint state-federal action are clearly described in *Buckeye Power, Inc.* v. *EPA, supra,* 481 F.2d at 165-66, and *Natural Resources Defense Council, Inc.,* v. *EPA,* 489 F.2d 390, 394-96 (5th Cir. 1974), *rev'd on other issues sub nom. Train* v. *Natural Resources Defense Council, Inc.,* — U.S. —, 43 U.S.L.W. 4467 (April 16, 1975). The dual (state-federal) approach of the Act is basic to its structure, and this case requires a delineation of certain areas of authority reserved to each governmental partner. The contention of petitioners that the scheme of the Act limits the role of EPA to that of setting primary and secondary ambient air quality standards and leaves to the States the selection of the means of attaining and maintaining these standards is an oversimplification.

Involved in this case is Section 110(a)(2) of the Act, 42 U.S.C. § 1875c-5(a)(2), by which the Administrator is required to approve or disapprove each plan or portion thereof within four months after the date required for submission by the States, approving the plan "if he determines

that it was adopted after reasonable notice and hearing" and that

> (B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls; . . . .

The respondents and the intervenor, Natural Resources Defense Council, Inc. (NRDC), argue that the Administrator is not required to approve a plan which does not include emission limitations, and that an alternate control strategy which is based upon intermittent emission control measures does not meet this requirement. Such practices are said to merely disperse the pollutants emitted from sources without reducing the amounts. Thus, these parties construe the language of Section 110(a)(2)(B) to mean that a plan must require each source of pollution to apply continuous limitations to the amount of sulfur dioxide which it emits. (Though the limitations requirement applies to several contaminants, the present case is concerned with sulfur dioxide.) The alternate control strategy advocated by petitioners would permit a source to restrict its emissions by switching to low sulfur fuel or reducing operations at the source only during those periods when atmospheric conditions and existing pollution levels dictate a need for a specific source emission reduction. Implemention of the alternative strategy would depend on the aggregate of pollution in a given area rather than the emission from any particular source.

The Fifth Circuit dealt with the same basic issue in NRDC v. EPA, supra, which involved a provision of the Georgia Plan that permitted amounts of particulates and

sulfur dioxide emissions to depend on the heights of smokestacks at the sources. The court held that this "tall stack" approach was in conflict with Section 110(a)(2)(B) of the Act since it resulted in the enhancement of dispersion of pollutants rather than limitation of their emission. Adopting the "broad approach" interpretation of Section 110(a)(2)(B), the court concluded that the Act established a policy of "nondegredation" of the atmosphere and that "[t]he only techniques fully capable of guaranteeing nondegredation are emission limitation techniques." 489 F.2d at 409.

The petitioners argue that the alternate control strategy which they would employ if the disapproved portion of the Kentucky Plan were reinstated would in fact be "emission limitations." It is their position that the intermittent control system provides a "flexible" emission limitation which restricts the amounts of pollutants emitted when atmospheric conditions require it. Thus, they contend that a system which *restricts* emissions of pollutants in any degree, if included in a plan, would qualify that plan for approval if the other conditions of Section 110 were met. Furthermore, the petitioners point out that Section 110 (a)(2)(B), in addition to requiring that a plan include emission limitations, also requires the inclusion of "such other measures as may be necessary to insure attainment and maintenance" of air quality standards. It is contended that "such other measures" refers to alternate control strategies.

The respondent and intervenor NRDC rely on the Fifth Circuit's answer to these arguments. That court held that the Act mandates the use of techniques for emission *reduction,* and that the use of other measures is permitted only when "necessary" in the sense that it is shown that emission reduction techniques are "unavailable or infeasible." 489

F.2d at 410. A plan which would permit unlimited emission of pollutants into existing clean air and require limitation only when emissions would cause air quality at the location of the particular polluting source to fall below prescribed standards would conflict with the congressional policy of nondegredation under the Fifth Circuit's interpretation of the Act.

On appeal to the Supreme Court, consideration of the Georgia Plan was limited to the question of whether variances were to be treated as "revisions" of the plan under Section 110(a)(3) or "postponements" under Section 110 (f). *Train* v. *NRDC, supra*, — U.S. at — (slip opinion at 7-8). The "tall stack" ruling was not appealed. Nevertheless, the Court traced the history of national clean air legislation and concluded that "the heart of the 1970 Amendments" is the requirement of Section 110(a)(2)(A) that each state plan provide for attainment, within three years of its approval, "of the national primary ambient air quality standards in the particular State." *Id.* at — (slip opinion at 5). After noting the requirement of Section 110(a)(2)(B) that a plan include "emission limitations, schedules, and timetables for compliance with such limitations," the opinion further noted that under the statute "it [a State plan] must *also* contain such other measures as may be necessary to insure both timely attainment and subsequent maintenance of national ambient air standards." *Id.* at — (slip opinion at 5) (emphasis added). It is clear from this language that other measures may not be substituted for emission limitations, but may only be provided in addition thereto.

Thus the question in this case is whether the emission limitations requirement of Section 110(a)(2)(B) was satisfied by the Kentucky Plan in view of its provision permitting an air contaminant source to apply an alternate control strategy. If the requirement was satisfied, the Administrator was required to approve the Plan as submitted. In *Train* v. *NRDC,* the Supreme Court provided a definition of "emission limitations" as follows:

> As we have already noted, primary ambient air standards deal with the quality of outdoor air, and are fixed on a nationwide basis at levels which the Agency determines will protect the public health. It is attainment and maintenance of these national standards which § 110(a)(2)(A) requires that state plans provide. In complying with this requirement a State's plan must include "emission limitations," which are regulations of the composition of substances emitted into the ambient air from such sources as power plants, service stations, and the like. They are the specific rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards. *Id.* at — (slip opinion at 16-17).

The key word in this definition is "composition." The pertinent definition of "composition" in *Webster's Third New International Dictionary* appears to be "the nature of a chemical compound or mixture as regards the kind and amounts of its constituents. . . . " Under this definition a rule or regulation pertaining to sulfur dioxide or any other contaminant, would qualify as an emission limitation only if it regulates the *amount* of that kind of material which may be included in the emission from a given source.

The petitioners contend that the use of the word "composition" by the Supreme Court was unfortunate, but that the opinion in *Train* v. *NRDC* otherwise fully supports their position. They rely particularly on the following language:

The Agency is plainly charged by the Act with the responsibility for setting the national ambient air standards. Just as plainly, however, it is relegated by the Act to a secondary role in the process of determining and enforcing the specific, source-by-source emission limitations which are necessary if the national standards it has set are to be met. Under § 110(a)(2), the Agency is *required* to approve a state plan which provides for the timely attainment and subsequent maintenance of ambient air standards, and which also satisfies that section's other general requirements. The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of §110(a)(2), and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards. § 110(c). Thus, so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation.

> —U.S. at — (slip opinion at 17).

We cannot assume that the word "composition" was imprecisely used. The language quoted above follows the Court's definition of emission limitations and must be read in the light of it.

No plan satisfies the requirement of Section 110(a)(2)(B) which might be construed to permit a source of pollutant emissions to continue operating beyond the time limit established in Section 110(a)(2)(A) without the application of one or more systems which control the "kind and amounts" of its air contaminant emissions. The Administrator determined that the provision of the Kentucky Plan which he disapproved was susceptible of a construction which would permit state approval of measures not within the definition of "emission limitations" without a showing that measures which satisfy that definition were unavailable. We find that the Administrator acted within the scope of his authority, that his decision was not arbitrary and did not constitute an abuse of discretion.

The first purpose of the 1955 Clean Air Act was stated to be "to protect and enhance the quality of the Nation's air resources. . . . " 42 U.S.C. § 1857(b)(1). As the Supreme Court pointed out in *Train* v. *NRDC* the states responded slowly to expressions of congressional concern about air pollution between 1955 and 1970, and "Congress reacted by taking a stick to the States in the form of the Clean Air Amendments of 1970. . . ." — U.S. at — (slip opinion at 2). The national policy is to reduce air pollution. Under the dual scheme, the freedom of the States to choose the manner of achieving this goal was made subject to the absolute requirement that every state plan include emission limitations as an ingredient. Nothing in the legislative history of the Act suggests that the Administrator has misinterpreted the congressional will in his construction of Section 110(a)(2)(B). As the Supreme Court noted in *Train v. NRDC*, interpretations of this complex statute by the agency charged with administering it are entitled to great deference. *Udall* v. *Tallman*, 380 U.S. 1, 16-18 (1965); *McLaren* v. *Fleischer*, 256 U.S. 477, 480-81 (1921). This court finds no reason to substitute its judgment for that of EPA in construing the Act.

The petitions for review are denied.

Pertinent Provisions of Clean Air Act, as Amended, 42 U.S.C.A. §§ 1857 Et Seq. (1974) Supp.

42 § 1857c-3 *PUBLIC HEALTH AND WELFARE*

§1857c-3. Air quality criteria and control techniques —Air pollutant list; publication and revision by Administrator; issuance of air quality criteria for air pollutants.

(a) (1) For the purpose of establishing national primary and secondary ambient air quality standards, the Administrator shall within 30 days after December 31, 1970, publish, and shall from time to time thereafter revise, a list which includes each air pollutant—

(A) which in his judgment has an adverse effect on public health or welfare;

(B) the presence of which in the ambient air results from numerous or diverse mobile or stationary sources; and

(C) for which air quality criteria had not been issued before December 31, 1970, but for which he plans to issue air quality criteria under this section.

(2) The Administrator shall issue air quality criteria for an air pollutant within 12 months after he has included such pollutant in a list under paragraph (1). Air quality criteria for an air pollutant shall accurately reflect the latest scientific knowledge useful in indicating the kind and extent of all identifiable effects on public health or welfare which may be expected from the presence of such pollutant in the ambient air, in varying quantities. The criteria for an air pollutant, to the extent practicable, shall include information on—

(A) those variable factors (including atmospheric conditions) which of themselves or in combination with other factors may alter the effects on public health or welfare of such air pollutant;

(B) the types of air pollutants which, when present in the atmosphere, may interact with such pollutant to produce an adverse effect on public health or welfare; and

(C) any known or anticipated adverse effects on welfare.

Issuance by Administrator of information on air pollution control techniques; standing consulting committees for air pollutants; establishment; membership

(b) (1) Simultaneously with the issuance of criteria under subsection (a) of this section, the Administrator shall, after consultation with appropriate advisory committees and Federal departments and agencies, issue to the States and appropriate air pollution control agencies information on air pollution control techniques, which information shall include data relating to the technology and costs of emission control. Such information shall include such data as are available on available technology and alternative methods of prevention and control of air pollution. Such information shall also include data on alternative fuels, processes, and operating methods which will result in elimination or significant reduction of emissions.

(2) In order to assist in the development of information on pollution control techniques, the Administrator may establish a standing consulting committee for each air pollutant included in a list published pursuant to sub-

section (a) (1) of this section, which shall be comprised of technically qualified individuals representative of State and local governments, industry, and the academic community. Each such committee shall submit, as appropriate, to the Administrator information related to that required by paragraph (1).

Review, modification, and reissuance by Administrator

(c) The Administrator shall from time to time review, and, as appropriate, modify, and reissue any criteria or information on control techniques issued pursuant to this section.

Publication in Federal Register; availability of copies for general public

(d) The issuance of air quality criteria and information on air pollution control techniques shall be announced in the Federal Register and copies shall be made available to the general public.

July 14, 1975, c. 360, Title I, § 108, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1678.

§ 1857c—4. National primary and secondary ambient air quality standards; promulgation; procedure

(a) (1) The Administrator—

(A) within 30 days after December 31, 1970, shall publish proposed regulations prescribing a national primary ambient air quality standard and a national secondary ambient air quality standard for each air pollutant for which air quality criteria have been issued prior to such date; and

(B) after a reasonable time for interested persons to submit written comments thereon (but no later than 90 days after the initial publication of such proposed standards) shall by regulation promulgate such proposed national primary and secondary ambient air quality standards with such modifications as he deems appropriate.

(2) With respect to any air pollutant for which air quality criteria are issued after December 31, 1970, the Administrator shall publish, simultaneously with the issuance of such criteria and information, proposed national primary and secondary ambient air quality standards for any such pollutant. The procedure provided for in paragraph (1) (B) of this subsection shall apply to the promulgation of such standards.

(b) (1) National primary ambient air quality standards, prescribed under subsection (a) of this section shall be ambient air quality standards the attainment and maintenance of which in the judgment of the Administrator, based on such criteria and allowing an adequate margin of safety, are requisite to protect the public health. Such primary standards may be revised in the same manner as promulgated.

(2) Any national secondary ambient air quality standard prescribed under subsection (a) of this section shall specify a level of air quality the attainment and maintenance of which in the judgment of the Administrator, based on such criteria, is requisite to protect the public welfare from any known or anticipated adverse effects associated with the presence of such air pollutant in the ambient air. Such secondary standards may be revised in the same manner as promulgated.

July 14, 1955, c. 360, Title I, § 109, as added Dec. 31, 1970, Pub.L. 91-604, §4(a), 84 Stat. 1679.

§ 1857c—5. State implementation plans for national primary and secondary ambient air quality standards—Submission to Administrator; time for submission; State procedures; required contents of plans for approval by Administrator; approval of revised plan by Administrator

(a) (1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 1857c—4 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan,

or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) (i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, land-use and transportation controls;

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions for intergovernmental cooperation, including measures necessary to insure that emissions of air pollutants from sources located in any air quality control region will not in-

terfere with the attainment or maintenance of such primary or secondary standard in any portion of such region outside of such State or in any other air quality control region;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; and (v) for authority comparable to that in section 1857h—1 of this title, and adequate contingency plans to implement such authority;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards; and

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements.

(3) The Administrator shall approve any revision of an implementation plan applicable to an air quality control region if he determines that it meets the requirements of paragraph (2) and has been adopted by the State after reasonable notice and public hearings.

(4) The procedure referred to in paragraph (2) (D) for review, prior to construction or modification, of the location of new sources shall (A) provide for adequate authority to prevent the construction or modification of any new source to which a standard of performance under section 1857c—6 of this title will apply at any location which the State determines will prevent the attainment or maintenance within any air quality control region (or portion thereof) within such State of a national ambient air quality primary or secondary standard, and (B) require that prior to commencing construction or modification of any such source, the owner or operator thereof shall submit to such State such information as may be necessary to permit the State to make a determination under clause (A).

Extension of period for submission of plan implementing national secondary ambient air quality standard

(b) The Administrator may, wherever he determines necessary, extend the period for submission of any plan or portion thereof which implements a national secondary ambient air quality standard for a period not to exceed 18 months from the date otherwise required for submission of such plan.

Preconditions for preparation and publication by Administrator of proposed regulations setting forth an implementation plan; hearings for proposed regulations; promulgation of regulations by Administrator

(c) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—

(1) the State fails to submit an implementation plan for any national ambient air quality primary or secondary standard within the time prescribed,

(2) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section, or

(3) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a) (2) (H) of this section.

If such State held no public hearing associated with respect to such plan (or revision thereof), the Administrator shall provide opportunity for such hearing within such State on any proposed regulation. The Administrator shall, within six months after the date required for submission of such plan (or revision thereof), promulgate any such regulations unless, prior to such promulgation, such State has adopted and submitted a plan (or revision) which the Administrator determines to be in accordance with the requirements of this section.

Applicable implementation plan

(d) For purposes of this chapter, an applicable implementation plan is the implementation plan, or most recent revision thereof, which has been approved under subsection (a) of this section or promulgated under subsection (c) of this section and which implements a national primary or secondary ambient air quality standard in a State.

Extension of time period for attainment of national primary ambient air quality standard in implementation plan; procedure; approval of extension by Administrator

(e) (1) Upon application of a Governor of a State at the time of submission of any plan implementing a national ambient air quality primary standard, the Administrator may (subject to paragraph (2)) extend the three-year period referred to in subsection (a) (2) (A) (i) of this section for not more than two years for an air quality control region if after review of such plan the Administrator determines that—

(A) one or more emission sources (or classes of moving sources) are unable to comply with the requirements of such plan which implement such primary standard because the necessary technology or other alternatives are not available or will not be available soon enough to permit compliance within such three-year period, and

(B) the State has considered and applied as a part of its plan reasonably available alternative means of attaining such primary standard and has justifiably concluded that attainment of such primary standard within the three years cannot be achieved.

(2) The Administrator may grant an extension under paragraph (1) only if he determines that the State plan provides for—

(A) application of the requirements of the plan which implement such primary standard to all emission sources in such region other than the sources (or classes) described in paragraph (1) (A) within the three-year period, and

(B) such interim measures of control of the sources (or classes) described in paragraph (1) (A) as the Administrator determines to be reasonable under the circumstances.

Postponement of compliance by any stationary source or class of moving sources with any requirement of an applicable implementation plan; application by Governor of affected State; determination by Administrator; notice and opportunity for hearing; judicial review; precedence of cases; subpoenas

(f) (1) Prior to the date on which any stationary source or class of moving sources is required to comply with any requirement of an applicable implementation plan the Governor of the State to which such plan applies may apply to the Administrator to postpone the applicability of such requirement to such source (or class) for not more than one year. If the Administrator determines that—

(A) good faith efforts have been made to comply with such requirement before such date,

(B) such source (or class) is unable to comply with such requirement because the necessary technology or other alternative methods of control are not available or have not been available for a sufficient period of time,

(C) any available alternative operating procedures and interim control measures have reduced or will reduce the impact of such source on public health, and

(D) the continued operation of such source is essential to national security or to the public health or welfare, then the Administrator shall grant a postponement of such requirement.

(2) (A) Any determination under paragraph (1) shall (i) be made on the record after notice to interested persons and opportunity for hearing, (ii) be based upon a fair evaluation of the entire record at such hearing, and (iii) include a statement setting forth in detail the findings and conclusions upon which the determination is based.

(B) Any determination made pursuant to this paragraph shall be subject to judicial review by the United States court of appeals for the circuit which includes such State upon the filing in such court within 30 days from the date of such decision of a petition by any inerested person praying that the decision be modified or set aside in whole or in part. A copy of the petition shall forthwith be sent by registered or certified mail to the Administrator and thereupon the Administrator shall certify and file in such court the record upon which the final decision complained of was issued, as provided in section 2112 of Title 28. Upon the filing of such petition the court shall have jurisdiction to affirm or set aside the determination complained of in whole or in part. The findings of the Administrator with respect to questions of fact (including each determination made under subparagraphs (A), (B), (C), and (D) of paragraph (1)) shall be sustained if

based upon a fair evaluation of the entire record at such hearing.

(C) Proceedings before the court under this paragraph shall take precedence over all the other causes of action on the docket and shall be assigned for hearing and decision at the earliest practicable date and expedited in every way.

(D) Section 1857h—5(a) of this title (relating to subpoenas) shall be applicable to any proceeding under this subsection.

July 14, 1955, c. 360, Title I, § 110, as added Dec. 31, 1970, Pub.L. 91-604, § 4(a), 84 Stat. 1680.

§ 1857d—1 Retention of State authority

Except as otherwise provided in sections 1857f—6a, 1857f—6c(c) (4), and 1857f—11 of this title (preempting certain State regulation of moving sources) nothing in this chapter shall preclude or deny the right of any State or political subdivision thereof to adopt or enforce (1) any standard or limitation respecting emissions of air pollutants or (2) any requirement respecting control or abatement of air pollution; except that if an emission standard or limitation is in effect under an applicable implementation plan or under section 1857c—6 or section 1857c—7 of this title, such State or political subdivision may not adopt or enforce any emission standard or limitation which is less stringent than the standard or limitation under such plan or section.

July 14, 1955, c. 360, Title I, § 116, formerly § 109 as added Nov. 21, 1967, Pub.L. 90-148, § 2, 81 Stat. 497, renumbered and amended Dec. 31, 1970, Pub.L. 91-604, § 4(a) (c), 84 Stat. 1678, 1689.

SUBCHAPTER III—GENERAL PROVISIONS

§ 1857g. Administration — Regulations; delegation of powers of Administrator

(a) The Administrator is authorized to prescribe such regulations as are necessary to carry out his functions under this chapter. The Administrator may delegate to any officer or employee of the Environmental Protection Agency such of his powers and duties under this chapter, except the making of regulations, as he may deem necessary or expedient.

Detail of Environmental Protection Agency personnel to air pollution control agencies

(b) Upon the request of an air pollution control agency, personnel of the Environmental Protection Agency may be detailed to such agency for the purpose of carrying out the provisions of this chapter.

Payments under grants; installments; advances or reimbursement

(c) Payments under grants made under this chapter may be made in installments, and in advance or by way of reimbursement, as may be determined by the Administrator.

As amended Dec. 31, 1970, Pub.L. 91-604, §§ 3(b) (2), 15(c) (2), 84 Stat. 1677, 1713.

§ 1857h.—Definitions

When used in this chapter—

(a) The term "Administrator" means the Administrattor of the Environmental Protection Agency.

[*See main volume for text of (b) to (f)*]

(g) The term "air pollutant" means an air pollution agent or combination of such agents.

(h) All language referring to effects on welfare includes, but is not limited to, effects on soils, water, crops, vegetation, manmade materials, animals, wildlife, weather, visibility, and climate, damage to and deterioration of property, and hazards to transportation, as well as effects on economic values and on personal comfort and well-being. As amended Dec. 31, 1970, Pub.L. 91-604, § 15(a) (1), (c) (1), 84 Stat. 1710, 1713.

• • • • •

RULING OF ADMINISTRATOR OF THE ENVIRONMENTAL PROTECTION AGENCY

(August 9, 1974)

Rules and Regulations 29357

Title 40—Protection of Environment

CHAPTER I—ENVIRONMENTAL PROTECTION AGENCY

Subchapter C—Air Programs

Part 52—Approval and Promulgation of Implementation Plans

Kentucky; Approval of Plan

On February 8, 1972, the Governor of Kentucky initially submitted to the Administrator of the Environmental Protection Agency the State's "Implementation Plan for the Attainment and Maintenance of the National and States Ambient Air Quality Standards." This (23958) plan had

been adopted by the State following a public hearing held on January 11, 1972, in Frankfort, Kentucky. It was submitted pursuant to section 110 of the Clean Air Act, as amended, and the implementing regulations of 40 CFR Part 51, which requires States to adopt implementation plans to achieve and maintain the national ambient air quality standards set forth in 40 CFR Part 50.

On May 31, 1972 (37 FR 10842), the Administrator approved the Kentucky plan with one exception, which arose from a deficiency in the State's legal authority to allow public release of emission data. This deficiency was subsequently resolved on July 27, 1972 (37 FR 15080), when the Administrator delegated to the Comm...wealth of Kentucky the required legal authority.

On June 28, 1973, a decision of the U.S. Court of Appeals for the Sixth Circuit in the Case of "Buckeye Power Co., et al. v. Environmental Protection Agency," 481 F. 2d 162, and two related cases, vacated the Administrator's approval of the Kentucky plan and remanded the case to the Agency for compliance with section 553 of the Administrative Procedures Act, viz., to take comments, data, or other evidence from interested parties, and to express the basis for administrative actions.

Consequently, on December 5, 1973, Governor Wendell Ford resubmitted to the Administrator the Kentucky implementation plan. Submitted as part of the plan was a new regulation, AP-11, providing for the pre-construction review of new or modified sources of air pollution. This was intended to satisfy additional implementation plan requirements involving indirect sources which had been promulgated on June 18, 1973 (38 FR 15834). AP-11 had received public hearing before being adopted and submitted to the Agency for approval.

On March 19, 1974 (39 FR 10277), the Administrator published as proposed rulemaking the provisions of the resubmitted Kentucky plan, including AP-11, its indirect source regulation. Also, it was noted that the Governor's formal request for a two-year extension of the deadline for meeting primary SO_2 standards in the Louisville Interstate AQCR, granted in the Administrator's original approval of May 31, 1972 (37 FR 10842), was considered to be still in effect. Written comments were solicited from the public with respect to the newly submitted Kentucky plan, and one response was received.

This recommended that the plan's alternate control strategy provision be retained and specifically approved, and that the regulation (AP-4) governing SO_2 emissions from power generating facilities be revised in such a way that its emission limits would apply only to those facilities which cause violation of ambient standards, as shown by the average data gathered from two or more monitoring stations.

With respect to the alternate control strategy provision of the plan, the Administrator's position is that it should be specifically disapproved, and his reason is given below under "Approval Comments."

With regard to the provisions of AP-4, the Administrator points out that section 116 of the Clean Air Act reserves to States the right to adopt and enforce measures which are more strict than those needed to attain and maintain the national standards. Therefore, emission limits cannot be disapproved or unilaterally relaxed by the Administrator on the ground that they are too stringent. As noted in his "Approval Comments," however, the Administrator encourages the Commonwealth of Kentucky to re-examine its SO_2 control strategy to determine if it can be modified without jeopardizing the attainment and maintenance of national standards.

Approval Comments

The Kentucky implementation plans meet the requirements of section 110 of the Clean Air Act, as amended, and the implementing regulations of 40 CFR Part 51, and is hereby approved with one exception.

Section 1(b) of Kentucky air pollution control regulation AP-1 states that:

Where it is demonstrated to the satisfaction of the [Kentucky Air Pollution Control] Commission that an air contaminant source can apply an alternate control strategy which will provide for achievement and maintenance of applicable ambient air quality standards, the Commission may, under such terms and conditions as it deems appropriate, authorize such a control strategy after a public hearing.

In his original approval of May 31, 1972 (37 FR 10842), the Administrator took note of the fact that a number of State plans contained optional control regulations of this sort. At that time, the Administrator took no action on these regulations, but advised the States that any application of them to specific sources would constitute a plan revision. It is now his opinion that this provision of the Kentucky plan—if not specifically disapproved—could be construed to permit intermittent control measures under circumstances where constant emission controls were available. To eliminate the possibility of such an interpretation, section 1(b) of AP-1 is disapproved as failing to meet the requirements of 40 CFR 51.12.

With respect to the plan's control strategy for attaining and maintaining the national standards for particulate matter, the Administrator notes that one of the imple-

menting regulations—AP-3, Control of Particulate Emissions—contains a provision, at section 2(7)(c)(ii), which has the effect of exempting from the emission limits of this regulation certain steam electric power boilers. This exemption applies to those boilers which had been subject to the provisions of old Regulation No. 7, in effect from November 27, 1969, to April 9, 1972, and had made a good faith effort to comply with it. The exemption would cease if the affected sources should be modified. Regulation No. 7 calls for a graduated degree of control which varies according to size—very small boilers are assigned an emission limit of 0.8# part./10^6 BTU, while for larger units the limit is 0.24# part./10^6 BTU. These limits are less stringent than those of AP-3.

At the Agency's request, Kentucky submitted on May 21, 1974, a list of sources subject to the limits of Regulation No. 7. These are as follows:

1. Big Rivers RECC
a. Coleman Station, Units 1, 2, and 3
b. Reid Station 1
c. Reid Station 2, Units 1 and 2
2. Eastern Kentucky Power Corporation
a. Cooper Station
b. Dale Station, Units 3 and 4
c. Maysville facility
3. Henderson Municipal Utilities
a. Station 1, Units 5 and 6
4. Kentucky Utilities
a. Brown Station, Units 1 and 2
b. Ghent facility, Unit 1
c. Green River Station, Unit 2, Boiler 3
d. Louisa facility, Unit 1
5. Owensboro Municipal Utilities
a. Elmer Smith Station, Units 1 and 2
b. Owensboro facility, Units 1, 2, 3 and 4

Of these 23 units, only 6 fail to meet the emission limits set forth in AP-3 as well as those of Regulation No. 7. The Administrator has determined that the exemptions just described will have no adverse effect on the attainment and maintenance of national ambient standards for particulate matter in Kentucky. In his judgment, the plan meets the requirements of 40 CFR 51.13 with respect to this pollutant.

The Administrator has determined that the Kentucky plan also meets the requirements of 40 CFR 51.13 with respect to sulfur oxides. The two-year extension originally granted for achieving primary SO_2 standards in the Louisville Interstate AQCR is hereby reaffirmed. The Administrator has reviewed the potential for attainment of primary SO_2 standards in this AQCR and has determined that it will not be feasible for electrical generating units and other fuel burning sources to achieve needed reductions in SO_3 [sic] emissions before mid-1977. Low sulfur fuel is not available in sufficient quantity to permit significant fuel switching in this heavily coal-dependent area. To attain primary standards, flue gas desulfurization is needed for at least four additional units of Louisville Gas and Electric's electrical generating system. The installation of this equipment cannot be completed prior to 1977 because of the inherent limitations of the design for construction process, although the Company has made significant progre to date. A particular difficulty has been the reluctance of the Kentucky Public Service Commission to approve expenditures for this purpose, which is necessary for continuing progress. Unavoidable equipment delivery delays encountered by other industrial sources in obtaining needed control equipment, which were projected in 1972, are being realized and will preclude their being able to totally achieve needed reductions before 1977. As an interim con-

trol effort, these sources are cooperating with State and local agencies to utilize all the low sulfur fuel they can obtain.

(29359) Since the supply of low sulfur fuels is currently limited, the Administrator, in accordance with the Agency's clean fuels policy, invites the State of Kentucky to re-examine the effects of its sulfur oxide regulations to determine whether less stringent limits might not, in certain portions of the State, adequately attain primary ambient air quality standards.

In the Administrator's judgment, the requirements of 40 CFR 51.14 are met by the Kentucky plan's control strategies for hydrocarbons, photochemical oxidants, and nitrogen oxides. On May 8, 1974 (39 FR 16344), the Louisville and Cincinnati AQCR's were reclassified as Priority III for nitrogen oxides. In view of this action, the Administrator invites the Commonwealth of Kentucky to re-examine its nitrogen oxide regulations to determine whether the national standards could be met without controlling emissions of this pollutant from stationary sources.

As announced previously, a number of individually negotiated compliance schedules were submitted by Kentucky along with its plan. These will appear as proposed rulemaking in a subsequent publication.

The Administrator has determined that the indirect source regulation of the Kentucky plan satisfies the requirements of 40 CFR 51.11 (a) (4), 51.12(e), and 51.18, and it is therefore approved. The Administrator's promulgation of a Federal regulation to satisfy these requirements is simultaneously revoked with respect to Kentucky (39 FR 7270 at 7281).

A detailed description of the plan is now given in such a way that the effect of the present actions on 40 CFR Part 52 can be clearly seen. The originally published plan of May 31, 1972, contained a classification of regions (§ 52.921) and attainment dates for the national standards (§ 52.926). These sections are retained as revised on May 8, 1974 (39 FR 16344), when the Louisville and Cincinnati regions were reclassified from I to III for NO_x, and the attainment dates were changed to show that secondary standards for this pollutant were already being met in these two AQCR's. Section 52.920, "Identification of plan," is retained as originally published together with subsequent amendments; these include notice of the plan's resubmittal on December 5, 1973, and the State's submittal of information regarding Regulation No. 7 on May 21, 1974. Section 52.921, "Extensions," is retained as originally published, for the Administrator has confirmed the granting of a two-year extension to meet primary SO_2 standards in the Louisville region. Sections 52.923, "Approval status," and § 52.924, "Legal authority," are retained as originally published. Section 52.925 is reserved. Section 52.927 is retained as originally published pending the Administrator's determination that all of the compliance schedule requirements of 40 CFR Part 51 have been met; action on any of the above-mentioned individually negotiated compliance schedules will be set forth in this section. Section 52.928, "Review of new sources and modifications," is revoked here. Section 52.929 is reserved. Section 52.930, "Control strategy: General," is added for the purpose of expressing the Administrator's disapproval of the plan's provision for optional control strategies applicable to individual sources.

The rulemaking actions set forth in this notice are effective immediately.

The Administrator finds that sufficient cause exists for making these actions immediately effective in that the Commonwealth of Kentucky has lacked a Federally enforceable implementation plan since June, 1973, through a decision of the U. S. Court of Appeals for the Sixth Circuit. Moreover, ample opportunity has now been given for public comment on the provisions of the plan, and further postponement of the effective date would serve no useful purpose.

(Sec. 110 of the Clean Air Act, as amended 1970 (42 U.S.C. 1857c—5).)

—Dated: August 9, 1974

John Quarles,
Acting Administrator

Part 52 of Chapter I, Title 40, Code of Federal Regulations, is amended as follows:

Subpart S—Kentucky

1. In § 52.920, paragraphs (b) and (c) are revised to read as follows:

§ 52.590 Identification of plan.

• • • • •

(b) The plan was officially submitted on February 8, 1972, and was resubmitted on December 5, 1973.

(c) Supplemental information was submitted on:

(1) March 6 and 17, May 3, and June 7, 1972, by the Kentucky Air Pollution Control Office, and

(2) December 5, 1973, and May 21, 1974, by the Kentucky Department for Natural Resources and Environmental Protection.

§ 52.928. [Revoked]

2. Section 52.928 is revoked.

3. Section 52.930 is added as follows:

§ 52.930 Control strategy: General.

(a) The requirements of § 51.12 of this chapter are not met since section 1 (b) of Kentucky regulation AP-1 may be interpreted as permitting the use of intermittent controls in cases where constant controls are available. Therefore, section 1(b) of regulation AP-1 is disapproved.

[FR Doc. 74-18755 Filed 8-14-74; 8:45 am]

• • • • •

PERTINENT PROVISIONS OF KENTUCKY AIR POLLUTION REGULATIONS

I. AP 1, General Provisions:

1. *GENERAL APPLICATION OF REGULATIONS AND STANDARDS*

(1) Regulations of the Commission shall be construed and applied in light of the considerations set forth hereinafter which shall guide the Commission in the issuance, modification and revocation of permits.

(a) All other provisions to the contrary notwithstanding, all air contaminant sources shall as a minimum apply such control procedures as are reasonable, available and practical.

(b) Where it is demonstrated to the satisfaction of the Commission that an air contaminant source can apply an alternate control strategy which will provide for achievement and maintenance of applicable ambient air quality standards, the Commission may, under such terms and conditions as it deems appropriate, authorize such a control strategy after a public hearing.

(c) Nothing in these regulations is intended to permit any practice which is in violation of any statute, ordinance, or regulation.

(d) These regulations shall be construed as complementary to each other, and to such other regulations as have been adopted or shall be adopted by the Commission. If any provisions of these regulations or the application thereof to any person or circumstances is held to be invalid, such invalidity shall not effect other provisions or application of any other part of these regulations, and to this end the provisions of these regulations and the various applications thereof are declared to be severable.

II. AP 4, Control of Sulfur Compound Emissions:

"1. *EMISSIONS FROM INDIRECT HEAT EXCHANGERS*

(1) New Installations of Indirect Heat Exchangers

(a) No person shall cause, suffer, allow or permit the emission of sulfur dioxide into the open air from any new installations of indirect heat exchangers having a rated capacity of 250 million BTU per hour or more heat input, in excess of:

(i) 0.8 lb. per million BTU heat input, maximum 2-hour average, when liquid fuel is burned;

(ii) 1.2 lb. per million BTU heat input, maximum 2-hour average, when solid fuel is burned.

(b) No person shall cause, suffer, allow or permit the emission of sulfur dioxide into the open air from any new installation of indirect heat exchangers of less than 250 million BTU/hour in excess of those amounts listed in Table 4-1 and shown in Figures 4.1 and 4.2 all of which are incorporated as part of this regulation.

TABLE 4-1

ALLOWABLE SULFUR DIOXIDE EMISSION BASED ON HEAT INPUT CAPACITY

MM BTU/ HOUR HEAT INPUT	*NEW INSTALLATION*	
	Liquid Fuel	*Solid Fuel*
10 or less	2.50	4.0
50	1.40	2.4
100	1.10	1.7
150	0.95	1.4
200	0.86	1.3
250 or more	0.80	1.2

(2) Existing Installations of Indirect Heat Exchangers —Regions classified as Priority I with respect to sulfur dioxide.

(a) No person shall cause, suffer, allow or permit the emission of sulfur dioxide into the open air from any

existing installations of indirect heat exchangers having a rated capacity of 250 million BTU per hour or more heat input, in excess of:

(i) 0.8 lb. per million BTU heat input, maximum 2-hour average, when liquid fuel is burned:

(ii) 1.2 lb. per million BTU heat input, maximum 2-hour average, when liquid fuel is burned;

(b) No person shall cause, suffer, allow or permit the emission of sulfur dioxide into the open air from any existing installation of indirect heat exchangers of less than 250 million BTU per hour input, in excess of those amounts listed in Table 4.2, and shown in Figures 4.1 and 4.2, all of which are incorporated as part of this regulation.

(3) Existing Installations of Indirect Heat Exchangers —Regions classified as Priority II with respect to sulfur dioxide.

(a) No person shall cause, suffer, allow or permit the emission of sulfur dioxide into the open air from any existing installations of indirect heat exchangers having a rated capacity of 500 million BTU per hour or more heat input, in excess of:

(i) 1.5 lb. per million BTU heat input maximum 2-hour average, when liquid fuels are burned;

(ii) 2.0 lb. per million BTU heat input, maximum 2-hour average, when solid fuel is burned.

(b) No person shall cause, suffer, allow or permit the emission of sulfur dioxide into the open air from any existing installation of indirect heat exchangers or less than 500 million BTU per hour heat input, in excess of those amounts listed in Table 4.2, and shown in Figures

4.1 and 4.2, all of which are incorporated as part of this regulation.

(4) Existing Installations of Indirect Heat Exchangers —Regions classified as Priority III with respect to sulfur dioxide.

(a) No person shall cause, suffer, allow or permit the emission of sulfur dioxide into the open air from any existing installations of indirect heat exchangers maving a rated capacity of 1000 million BTU per hour or more heat input, in excess of:

(i) 2.0 lb. per million BTU heat input, maximum 2-hour average, when liquid fuel is burned;

(ii) 3.5 lb. per million BTU heat input, maximum 2-hour average, when solid fuel is burned.

(b) No person shall cause, suffer, allow or permit the emission of sulfur dioxide into the open air from any existing installation of indirect heat exchangers of less than 1000 million BTU per hour heat input, in excess of those amounts listed in Table 4.2, and shown in Figures 4.1 and 4.2, all of which are incorporated as part of this regulation.

(5) Maximum Emission from Indirect Heat Exchangers

(1) No person shall construct any indirect heat exchanger or modify any existing indirect heat exchanger so that its total emissions exceeds 500 tons of sulfur dioxide per day.

(2) No person shall construct any new indirect heat exchanger or modify any existing indirect heat exchanger where two or more indirect heat exchangers, including that indirect heat exchanger for which construction or modification is proposed, and which individually emit 100

tons per year or more of sulfur dioxide, are contained within a circle 10 miles in diameter, and the total emissions of all such indirect heat exchangers is 750 tons per day of sulfur dioxide or more.

(6) For any given indirect heat exchanger air contaminant source the combined total capacity of all fuel burning units in that air contaminant source shall determine the amount of allowable sulfur dioxide emissions.

• • • • •

6. *TIME SCHEDULE FOR COMPLIANCE*

(1) For the purpose of this section, the following time tables shall apply, however, all air contaminants sources covered under this section are required to submit a control plan and schedule for compliance as outlined in AP-1, Sec. 11(2):

(a) Those indirect heat exchangers described in Section 1(2) submit a control plan and schedule no later than January 1, 1973 with a compliance date of no later than July 1. 1977.

(b) Those indirect heat exchangers described in Section 1(3) submit a control plan and schedule no later than January 1, 1973 with a compliance date of no later than July 1, 1978.

(c) Those indirect heat exchangers described in Section 1(4) submit a control plan and schedule no later than January 1, 1973 with a compliance date of no later than July 1, 1979.

(d) All other air contaminant sources governed by this section shall comply as specified in AP-1, Section 11."

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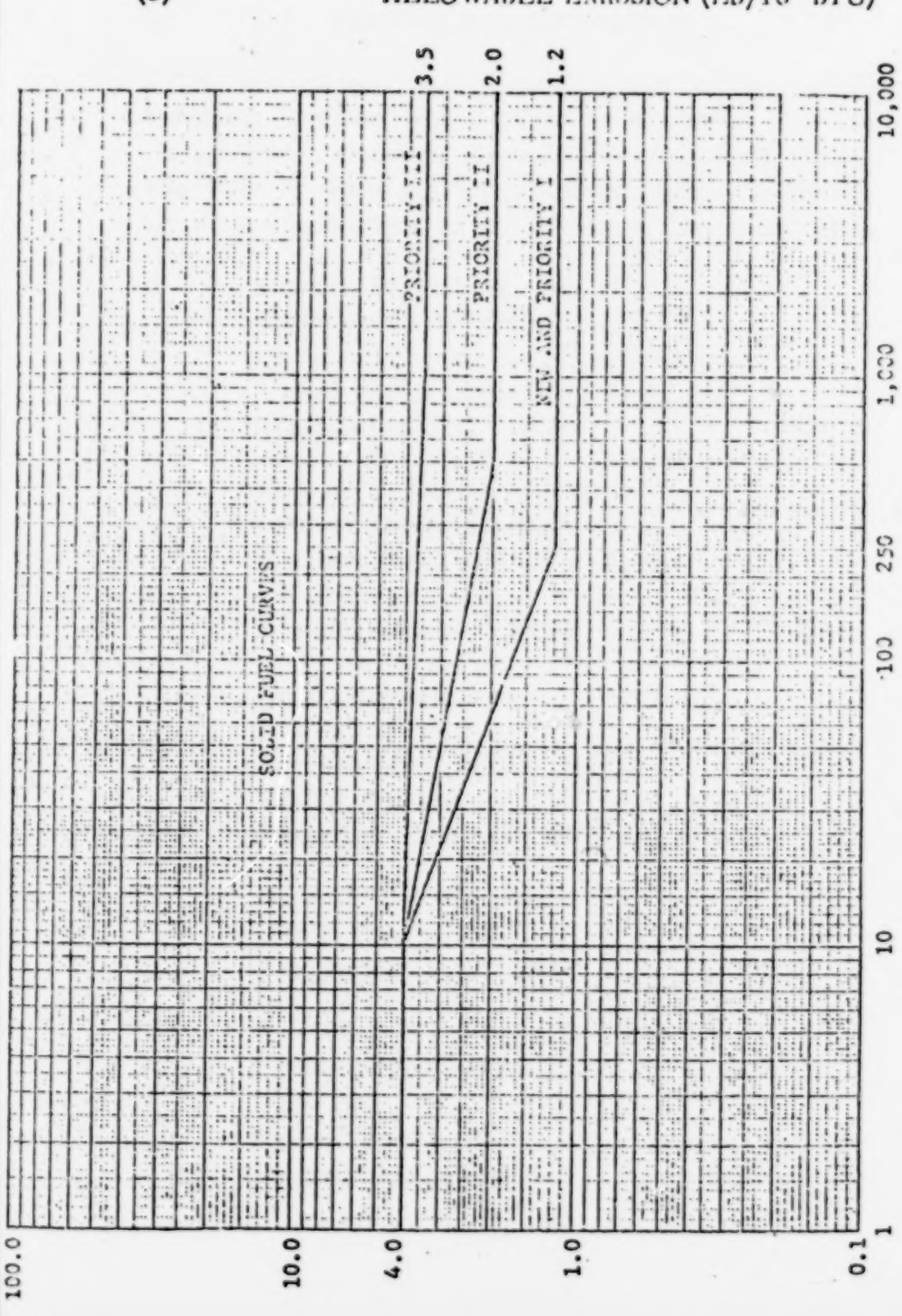

FIGURE 4.1 ALLOWABLE SULFUR DIOXIDE EMISSIONS BASED ON HEAT INPUT CAPACITY

CERTIFICATE OF SERVICE

The undersigned hereby certifies that service of the foregoing Petition For a Writ of Certiorari To The United States Court of Appeals For The Sixth Circuit was made by mailing a copy, postage prepaid, to the below-named individuals on the 28 day of November, 1975.

Charles W. Shipley, Esq.
Pollution Control Section
Land and Natural Resources of Division
United States Department of Justice
Washington, D.C. 20530

Richard J. Denny, Jr., Esq.
Office of General Counsel
Environmental Protection Agency
401 M Street, SW
Washington, D.C. 20024

Ed W. Hancock, Esq.
Attorney General
Commonwealth of Kentucky
Capitol Building
Frankfort, Kentucky 40601

Richard E. Ayers, Esq.
1710 N Street, NW
Washington, D.C. 20036

Armistead W. Gilliam, Jr., Esq.
Smith and Schnacke
Suite 390
Talbott Tower
Dayton, Ohio 45402

J. William Doolittle, Esq.
Prather, Levenberger, Seeger,
Doolittle, Farmer, and Ewing
1101 16th Street, NW
Washington, D.C. 20036

Thomas O. Harris
Secretary for Natural Resources
& Environmental Protection
Capital Plaza
Frankfort, Kentucky 40601

Herbert S. Sanger, Jr., Esq.
General Counsel
Tennessee Valley Authority
Knoxville, Tennessee 37902

Frank H. Morison, Esq.
Holland & Hart
500 Equitable Building
730 Seventeenth Street
Denver, Colorado 80202.

WILSON W. SYNDER

Supreme Court, U. S.
FILED
FEB 18 1976
MICHAEL RODAK, JR., CLERK

No. 75-774

In the Supreme Court of the United States

OCTOBER TERM, 1975

BIG RIVERS ELECTRIC CORPORATION, ET AL., PETITIONERS

v.

ENVIRONMENTAL PROTECTION AGENCY, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

ROBERT H. BORK,
Solicitor General,

PETER R. TAFT,
Assistant Attorney General,

RAYMOND N. ZAGONE,
EDWARD J. SHAWAKER,
CHARLES W. SHIPLEY,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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v.

ENVIRONMENTAL PROTECTION AGENCY, ETC.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENTS IN OPPOSITION

The Environmental Protection Agency takes the same position with respect to this petition for a writ of certiorari as that stated in its brief in opposition in *Tennessee Valley Authority* v. *Environmental Protection Agency,* No 75-787, a copy of which we are serving on petitioners here. Both cases raise the same issues and are petitions for certiorari from the same decision.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted if the Court agrees the case is moot, in which event the judgment

should be vacated and the case remanded for dismissal as moot. Otherwise, the petition should be denied.

ROBERT H. BORK,
Solicitor General.

PETER R. TAFT,
Assistant Attorney General.

RAYMOND N. ZAGONE,
EDWARD J. SHAWAKER,
CHARLES W. SHIPLEY,
Attorneys.

FEBRUARY 1976.

Supreme Court, U. S.
FILED
MAR 1 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-774

**BIG RIVERS ELECTRIC CORPORATION,
KENTUCKY POWER COMPANY and
KENTUCKY UTILITIES COMPANY,**
Petitioners,

v.

**ENVIRONMENTAL PROTECTION AGENCY,
RUSSELL E. TRAIN, ADMINISTRATOR,**
Respondents.

REPLY BRIEF OF PETITIONERS
TO
BRIEF FOR THE FEDERAL RESPONDENTS

Wilson W. Snyder
300 Madison Avenue
P. O. Box 2088
Toledo, Ohio 43603
Attorney for Petitioners

Of Counsel:
A. Joseph Dowd
2 Broadway
New York, New York 10004

Interstate Brief & Record Co., 1036 Beaubien St., Detroit, Michigan 48226
962-8745—962-8732

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OCTOBER TERM, 1975

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Petitioners,

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RUSSELL E. TRAIN, ADMINISTRATOR,
Respondents.

REPLY BRIEF OF PETITIONERS TO BRIEF FOR THE FEDERAL RESPONDENTS

This reply brief of Petitioners is addressed to arguments first raised in the Brief of the Federal Respondents in opposition to the petition of Tennessee Valley Authority for Certiorari (hereinafter referred to as "Respondents' Brief") which brief has been adopted by reference in the brief of Respondents filed in this case.

1. MOOTNESS IS NOT A QUESTION PRESENTED FOR CONSIDERATION IN CONNECTION WITH THIS PETITION FOR CERTIORARI.

On pages 6 through 3 of Respondents' Brief it is pointed out that the Kentucky agency, prior to the hearing in the Sixth Circuit Court of Appeals, eliminated the alternate control strategy provision which was disapproved by the Federal Administrator from its regulations. Both Kentucky and the Federal Respondents moved to dismiss the Petition for Review, but the Appellate Court denied the motion and decided the case on the merits.

Whether the Court of Appeals was right or wrong in its decision on the mootness issue, mootness is not a question presented for consideration in connection with this Petition for Certiorari. Petitioners do not contest the decision on mootness and there has been no cross petition for certiorari on that issue. Irrespective of the correctness of the decision on the mootness issue, that decision on the merits decided important questions of federal law which will continue into the future to have a nationwide effect of great social and economic importance. The only way that these issues can be finally resolved is for the Supreme Court to grant the Petition for Certiorari.

2. THE SIXTH CIRCUIT COURT OF APPEALS DECISION IS NOT CORRECT ON THE MERITS.

Respondents argue that the Sixth Circuit Court of Appeals decision is correct on the merits and does not conflict with any decision of this court or any court of appeals. (Respondents' Brief, p. 8). Petitioners assert that the decision is not correct on the merits. Also, even though the Supreme Court did not decide the issues involved in this

case in *Train v. NRDC,* 421 U.S. 60 (1975), the legal principles laid down in that case in regard to variances should be applied to alternate control strategies such as were authorized by the Kentucky Implementation Plan. Such application would require that the Court of Appeals decision be set aside. This correction can be made by the granting of the writ.

a) It is Respondents' position that every court that has considered the language of Section 110(a)(2)(B) of the Clean Air Act has construed it to require the use of all available measures for continuous limitation of emissions. (Respondents' Brief, p. 9). The Fifth Circuit decision in *Natural Resources Defense Council, Inc. v. Environmental Protection Agency,* 489 F.2d 390 (5th Cir. 1975) is cited as one such case. Petitioners have pointed out (Petition, pp. 7-8) that only the variance portion of that case was appealed to the Supreme Court, and one of the purposes of this petition for certiorari is to enable this court to complete the picture by deciding the emission regulation as well. If this court had applied the same legal doctrine announced in *Train v. NRDC,* 421 U.S. 60 (1975) to the second issue in the Fifth Circuit case as it did to the variance issue, the entire Fifth Circuit decision would have been reversed. If the state has the right, as declared in the *Train* case, to choose its own mix of emission limitations to meet its particular situation, "so long as the ultimate effect • • • is compliance with the national standards for ambient air" (421 U.S. 60 at 79), then the emission limitations in the Fifth Circuit case as well as the alternate control strategy in the Kentucky plan should have been approved. The foregoing error of the Fifth Circuit was perpetuated in the case of *Kennecott Copper Corporation v. Train,* No. 75-1335 — F.2d — (9th Cir. 1975, Petition for Certiorari pending) cited by Respondents on p. 8 of

their brief. That case, relying in part on the Fifth Circuit case, erroneously construes the Clean Air Act and denies the state the right to choose its own mix of emission limitations. It did, however, recognize that so called constant emission controls could not be required "unless it were economically feasible to do so" (Slip Opinion, p. 12). The spread of the error of the Fifth Circuit decision emphasizes the need for this court to clear up the entire matter by granting certiorari in this and the *Kennecott* case.

Petitioners have already answered Respondents' argument set forth on p. 9 of their brief that the definition of emission limitations in the *Train* case justified the disapproval of the alternate control strategy in the Kentucky plan. (Petition, pp. 7-8). There are numerous alternate control strategies which regulate the composition of substances such as sulfur dioxide, emitted into the ambient air and hence, the portion of the Kentucky plan which would have permitted such strategies should not have been disapproved. (Petition, pp. 11-12).

b) The purpose of the Clean Air Act would not be violated by the alternate control strategy of the Kentucky Implementation Plan as claimed by Respondents on pages 10 through 12 of their brief. In the *Train* case, this court recognized that the purpose of Section 110(a)(2)(B) of the Act was to achieve the national standards for ambient air. "Thus, so long as the ultimate effect of the State's choice of emission limitations is compliance with the national standards for ambient air, the State is at liberty to adopt whatever mix of emission limitations it deems best suited to its particular situation", 421 U.S. at 79. The ambient standards are the ones which are to protect health and general welfare. *If they are not exceeded such protection will be achieved whether or not the emission limitation takes into account dispersion or intermittent reduction.* If it is found as a matter of fact that any particular alternate control strategy will cause a failure to meet or maintain the ambient standards, then it is a defect in that particular strategy which would justify its disapproval. The state should not be denied its right to choose its own mix of emission limitations so long as ambient standards are met. Meeting such standards was one of the conditions of the Kentucky alternate control strategy.

Certain assumptions made by U.S. EPA in regard to intermittent control strategies are erroneous and show the lack of understanding by the agency of an electric utility's operation. The EPA staff paper cited in footnote 1, (Respondents' Brief, pages 3 and 4) asserts that "if plant operation is curtailed during poor dispersion conditions, then it may be increased during good conditions to make up for the lost production. Average emissions would be about the same with or without [an intermittent control system] for this situation." A similar statement relating to copper smelters is quoted from the case of *Kennecott Copper Corporation v. Train,* No. 75-1335 — F.2d — (9th Cir. 1975) at page 11 of Respondents' Brief. This type of conjecture has no application whatsoever to an electric generating plant because the demand for electricity is instantaneous in nature and therefore must be supplied on an instantaneous basis. There is no such thing as making up lost production of electricity. If it is necessary to secure power from other sources to make up a curtailment of a particular generator on one day, the demand for power the next day to be met by the generator which was curtailed will not be one bit more because of the securing of additional power the day before. Thus, in fact, there always would be a net reduction of emissions. The second concept contained in the EPA staff paper cited in footnote 1 on pages 3 and 4 of Respondents' Brief is equally inapplicable to an electric utility. The staff paper claims that:

> "If clean fuel is used to reduce emissions during poor dispersion conditions, then average emissions will be reduced somewhat. If fuel with higher sulfur content is used during good conditions, then average emissions could be greater with [an intermittent control system].* * *"

For example, under an intermittent control strategy, a utility might be permitted to burn coal with a 3% sulfur content during ordinary conditions because the emissions resulting from such limitation would enable the achievement and maintenance of the ambient sulfur dioxide standards, but would be required to burn coal with a 1% sulfur content during certain meteorological conditions. When the meteorological conditions disappeared, the utility would have to go back to the same 3% coal it was previously burning. There would be no reason in the intermittent control strategy to allow burning of a higher sulfur coal nor would there be any incentive to do so. Hence, there would be an overall reduction in the average emissions.

Respondents also confuse the relevancy of the non-degradation policy of the Act. (Respondents' Brief, p. 12.) The case which Petitioners seek to have this court review deals with the right of a state to choose its own mix of emission limitations by way of alternate control strategies *to meet ambient standards.* If, as a *matter of fact, peculiar to a particular location,* it would be found that a *particular* strategy would result in the degradation of an exceptionally pure air area, then it is that particular situation which should be given special consideration rather than take away the entire right of the state to adopt its own mix. To do otherwise would be a classic example of putting the cart before the horse. If, for example, alternate control strategies will enable the ambient standards to be met and

maintained in 99% of the area of the state, they should not be ruled out because such strategy might not be desirable in 1% of the area of the state. It is the 1% which should receive special attention. Otherwise, many hundreds of millions of dollars of needless expense would have to be borne by the people of the state for overkill in 99% of the state.

c) The subsequent legislation dealing with converting certain large sources from oil or gas to coal does not support Respondents' contention that it declares the intent of Congress as to the earlier statute to prohibit states from choosing alternate control strategies. (Respondents' Brief pp. 12-16.) The Energy Supply and Environmental Coordination Act of 1974, referred to by Respondents, deals with a situation where an existing source is not presently a significant source of certain pollutants because it is burning a clean fuel such as natural gas and proposes to convert to a fuel which will thereafter result in new emissions which are designated as pollutants. In other words *a new cause of pollution* will come into being. A modified "new source" philosophy is applied by The Energy Act. Instead of having to immediately achieve compliance, such as would be the case of the usual new source, temporary relief is granted (to make the switch practicable) but the ultimate requirement is for strict compliance with the applicable emission restrictions.

The Conference Report of the Joint Committee of the Senate and House on the Energy Supply and Environmental Coordinator Act expressly recognizes that the Act is dealing with a *new* air pollution threat. The report states:

> "* * * In the judgment of the conferees, the Administrator of EPA should be authorized to assure

that orders prohibiting the burning of petroleum products or natural gas under section 2(a) of the Energy Supply and Environmental Coordination Act *would not create major new air pollution threats to health,* exacerbate existing serious threats to health as a result of the increased emission of such presently unregulated air pollutants, or prevent sources of such pollutants from reducing a significant risk to health."

(Conference Board No. 93-1085 "Joint Explanatory Statement of the Committee of Conference", U. S. Code Congressional and Administrative News, Volume 2, 93rd Congress Second Session 1974, page 3314. Emphasis added).

The Clean Air Act clearly recognizes the difference between new sources and existing sources and treats new sources in a more restrictive manner. The fact that Congress subesquently provides only for temporary use of intermittent controls in what it treats as a *new cause of pollution* can in no way be an argument that states are obligated to indulge in unreasonable overkill by establishing a single emission standard for all existing sources. The separate treatment of these existing sources is expressly limited by the Clean Air Act to meeting and maintaining the ambient standards. This is the very thing which Kentucky's alternate control strategy required. Senator Muskie's after the fact attempt (see quotation on p. 15 of Respondents' Brief) to express his *personal* philosophy as to how the Clean Air Act (passed several years earlier) should be interpreted, can hardly be given any value as legislative history or intent.

CONCLUSION

The misinterpretation of the Clean Air Act which is evident in Respondents' Brief is a strong argument why it is important that this Court grant the Petition for Certiorari in this case and clear up these important questions for the regulator and the regulated.

Respectfully submitted,

WILSON W. SNYDER
300 Madison Avenue
P. O. Box 2088
Toledo, Ohio 43603
Telephone: (419) 255-8220
Attorney for Petitioners

Dated: March 4, 1976

Of Counsel:

A. JOSEPH DOWD, Esq.
2 Broadway
New York, New York 10004

Supreme Court, U. S.
FILED
JAN 16 1976
MICHAEL RODAK, JR., CLERK

No. 75-774

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

BIG RIVERS ELECTRIC CORPORATION
KENTUCKY POWER COMPANY and
KENTUCKY UTILITIES COMPANY,
Petitioners,

v.

ENVIRONMENTAL PROTECTION AGENCY,
RUSSELL E. TRAIN, Administrator,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF AMICUS CURIAE FOR THE BAY AREA LEAGUE OF INDUSTRIAL ASSOCIATIONS, INC.

JOHN T. RONAN, III
Tuxedo, New York 10987

H. EDWARD DUNKELBERGER, JR.
THEODORE L. GARRETT
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006

Attorneys for Amicus Curiae

January 1976

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BRIEF AMICUS CURIAE FOR THE BAY AREA LEAGUE OF INDUSTRIAL ASSOCIATIONS, INC.

INTEREST OF AMICUS CURIAE

The Bay Area League of Industrial Associations, Inc. submits this brief in support of petitioners Big Rivers *et al.* Both petitioners and respondent Environmental Protection Agency have consented to the filing of this brief amicus by letters which have been

presented to the Clerk of the Court pursuant to Rule 42(2).

The Bay Area League of Industrial Associations, Inc. ("BALIA") is an incorporated league of industrial corporations with manufacturing facilities located in the San Francisco Bay area. BALIA is a party to rulemaking in which the EPA has proposed formally to disapprove certain provisions in the Bay Area implementation plan solely on the grounds that it permitted ground level monitoring controls, based upon the same rationale as the agency's disapproval of the Kentucky regulation involved in this case. It is respectfully submitted that the decision below raises important questions concerning the implementation of the Clean Air Act which will have far reaching impact upon amicus curiae, its members, and other industries similarly situated.

REASONS FOR GRANTING THE WRIT

The granting of the petition for a writ of certiorari in this case is supported by several grounds that are traditionally deemed by this Court to warrant plenary review.

I. The Issues Raised by the Decision Below Are of Continuing and Overriding Importance Concerning the Implementation of the Clean Air Act

The petitioners have pointed to the significant economic impact which would be borne by consumers of electric power if the states were required in all cases to enforce only certain types of emission control regulations—"constant emission controls"—and were not permitted to adopted the combination of air pollution regulations best suited to their particular situa-

tion which would meet the national air quality standards. The impact of the decision below, however, would be felt beyond the electric power industry to the extent that it stands as precedent for the disapproval of all ground level monitoring emission controls as *per se* invalid under Section 110(a)(2)(B) of the Clean Air Act, even where such controls are demonstrably effective to reduce or limit air pollution emissions to attain and maintain national air quality standards.

Illustrative of the kind of effective ground level monitoring control which might be held invalid if the decision below were permitted to stand is San Francisco Bay Area BAAPCD Regulation 2, which the EPA has proposed retroactively to disapprove. 40 Fed. Reg. 4445 (January 30, 1975). This regulation permits industrial sources to employ certain types of ground level monitoring controls which limit emissions at all times to meet a 24-hour ground level standard which is more than three times more stringent than the EPA national air quality standard. Where this ground level standard is exceeded by an industrial source, emission control devices are required to limit emissions to meet the standard. In contrast with the intermittent control systems permitted under the Kentucky regulation disapproved in the decision below, emission rates under BAAPCD Regulation 2 are *not* adjusted upward or downward to meet changes in meteorological conditions. Rather, emissions are limited at all times to a level sufficient to meet the stringent BAAPCD standard under the worst predictable meteorological conditions .

The EPA national air quality standards for sulfur dioxide were attained in the San Francisco Bay Area as of May 31, 1972, the date that EPA approved the

California State implementation plan. 40 C.F.R. § 52.238. Computer modeling simulations and actual monitoring data submitted to EPA by amicus curiae demonstrate that the national standards have been maintained since that date and will continue to be maintained in the future by a substantial margin . These data further demonstrate that since May 31, 1972, enforcement of BAAPCD Regulation 2 has effected a substantial reduction in the sulfur dioxide emissions in the San Francisco Bay Area, and has improved air quality beyond that required under the EPA national standards. Further, very substantial additional reductions of emissions are scheduled in 1976. Millions of dollars have been spent since May 31, 1972, by San Francisco Bay Area industry to meet the requirements of BAAPCD Regulation 2.

The proposed retroactive disapproval by EPA of BAAPCD Regulation 2 is based *solely* on the fact that it provides ground level monitoring controls as an option. As stated by the Administrator in his notice of proposed rulemaking:

> "Regulations which contain an emission limitation but which permit compliance with ambient air limitations as an option to compliance with the emission limitation are not approvable." 40 Fed. Reg. at 4446.

If the BAAPCD Regulation 2 ground level monitoring control option is disapproved, the various industry members of BALIA will be required to spend additional millions of dollars for the further abatement of sulfur dioxide emissions although such additional expenditure would not be necessary to maintain the national air quality standards.

This case has an importance beyond that of amicus curiae and its members, significant as that is. In its January 30, 1975, announcement proposing disapproval of BAAPCD Regulation 2, EPA made it clear that the agency would be taking further action to disapprove all state plans which contain optional control features. 40 Fed. Reg. at 4446. The decision below thus involves a question of continuing importance under the Clean Air Act which should be reviewed by this Court.

II. The Decision of the Court of Appeals Below Restricts the Rights of the States, Recognized by This Court in Train v. NRDC, To Adopt a Wide Range of Emission Controls Provided that Such Controls Are Effective To Meet National Standards

The decision below is inconsistent with Congressional policy and misreads this Court's decision in *Train* v. *NRDC,* 421 U.S. 60 (1975), in that it sustains the EPA's disapproval of the Kentucky air pollution regulation without regard to the effectiveness of the control systems permitted under the Kentucky regulation to reduce or limit air contaminant emissions to attain and maintain national air quality standards.[1]

Section 110(a)(2)(B) of the Clean Air Act, 42 U.S.C. § 1857c-5(a)(2)(B), provides that the EPA

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[1] "The portion [of the Kentucky regulations] which was disapproved provided as follows:

> " 'Where is it demonstrated . . . that an air contaminant source can apply an *alternative control strategy* which *will provide for achievement and maintenance of applicable air quality standards,* the Commission may . . . authorize such control strategy . . . .' " 523 F.2d at 18 (emphasis added).

The Kentucky regulation thus required that an applicable alternative contral strategy must be effective to attain and maintain national standards.

Administrator must determine whether a state implementation plan "includes emission limitations . . . and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard." In *Train* v. *NRDC,* 421 U.S. 60 (1975), this Court affirmed the right of a state to adopt "whatever mix of emission limitations" it deems best suited to its particular situation "so long as the ultimate effect of a State's choice of emission limitations is compliance with the national standards for ambient air . . . ." 421 U.S. at 79. This Court's decision in *Train,* therefore, mandates EPA approval of state regulations where they are demonstrably effective for the timely attainment and subsequent maintenance of ambient air standards.

The *Train* decision not only permits maximum flexibility in the kind and mix of control regulations a state may adopt, but, as well, makes it clear that an approvable control strategy may provide that an individual source or group of sources may be completely excepted from the plan. 421 U.S. at 93-94, n. 28. It is within the states's discretion to determine which sources will be restricted as a part of its mix of emission limitations, provided that this mix is sufficient to attain and maintain national standards. As indicated in the *Train* decision, whether or not a specific source or group of sources is controlled by the state's emission limitation mix is not a basis for EPA disapproval of the implementation plan provision.

Further, EPA's emphasis on "constant emission controls" is also directly contrary to this Court's admonition in *Train* against "forcing" the use of technology. The agency's position, as set forth in its proposed disapproval of the Bay Area regulations, is that "constant emission controls" must be applied "wherever technology is available." 40 Reg. 4446. This aspect of EPA's legal position was totally rejected by this Court in *Train*:

> " [S]o long as the national standards are being attained and maintained, there is no basis in the present Clean Air Act for forcing further technological developments." 421 U.S. at 91.

The Clean Air Act as interpreted by this Court in the *Train* decision permits the states to adopt and enforce a wide spectrum of types of emission controls provided that they are demonstrably effective to reduce or limit emissions to maintain and attain national air quality standards.

III. The Court of Appeals Below Has Misread the Decision of This Court in Train v. NRDC and Has Misconstrued the Definition of "Emission Limitation" Under Section 110(a)(2)(B) of the Clean Air Act

The Court of Appeals below misconstrued the opinon of this Court in the *Train* decision to justify the *per se* disapproval of certain classes of emission controls without inquiry into their effectiveness to meet national standards. In *Train* v. *NRDC,* 421 U.S. 60, 78 (1975), this Court referred to the term "emission limitations" broadly as:

> " [R]egulations of the composition of substances emitted into ambient air from [pollution] sources .... They are the specific rules to which operators of pollution sources are subject, and which if enforced should result in ambient air which meets the national standards."

Although this Court did not elaborate further on this point, since it was not an issue in that case, the court

below seized upon the single term "composition" in the foregoing quote, and redefined an "emission limitation" under Section 110(a)(2)(B) of the Act as

> "[A] rule or regulation pertaining to sulfur dioxide or any other contaminant would quality as an emission limitation only if it regulates the amount of that kind of material which may be included in the emission from a given source." 523 F. 2d at 21-22.

The court then leaped to the conclusion that only a constant emission control device on all sources would satisfy this definition.

The decision below is not supported by this Court's opinion in *Train,* and is contrary to the mandate of Congress. Section 110(a)(2)(B) of the Act refers to "emission limitations and such other measures" and is not confined to constant emission controls. EPA's state plan regulations by their own terms permit great flexibility to the states in the kind and mix of pollution control regulations which they may adopt, collectively termed a "control strategy":

> "'Control strategy' means a combination of measures designed to achieve the aggregate reduction of emissions necessary for attainment and maintenance of a national standard . . . ." 40 C.F.R. § 51(n).

Further, EPA's interpretation of "emission limitations" is inconsistent with Congress' careful use of the term "emission standard" in other provisions of the Act—such as Sections 111 and 112—to refer to constant emission controls. 42 U.S.C. §§ 1857c-6, 1857c-7.

Finally, it is noteworthy that the decision of the Court of Appeals in *NRDC* v. *EPA,* 489 F.2d 390 (5th Cir. 1974), *reversed on other grounds sub nom Train* v. *NRDC,* 421 U.S. 60 (1975), upon which the decision below relies, does *not* go so far as to require "constant emission controls." The distinction between "constant emission controls," *i.e.,* "emission standards," and the broader class of permissible "emission limitations" which may serve to indirectly limit the amount of emissions was clarified by the Fifth Circuit as follows:

> "[I]t is necessary to . . . define different categories of the kinds of 'enforceable controls' which may be employed to affect attainment of ambient air standards. The first, '*emission standards*' refers to standards setting specific *quantitative limits on the amounts* given individual sources may emit into the air. The second, '*emission limitations*' [as defined in Section 110(a)(2)(B) of the Clean Air Act], *is an inclusive term referring to any type of control to reduce the amount of emissions into the air.* This includes, of course, 'emission standards', but also includes a number of regulatory devices. These range from regulations directing sources of emissions to cease or curtail operations to regulations specifying the sulfur content of fuel that fuel-burning emission sources may burn; 'transportation controls' designed to reduce the use of motor vehicles . . . and the imposition of emission charges or other economic incentives aimed at inducing parties to reduce their emissions voluntarily." 489 F.2d at 394, n.2 (emphasis added).

In short, the decision below which mandates constant emission controls is based upon a reading of the Act which is without basis in the statutory language, EPA's own regulations, or judicial decisions.

CONCLUSION

It is respectfully submitted that the decision below was erroneous on questions of great importance to amicus curiae and to other industries affected by state implementation plans. Review by this Court is essential.

Respectfully submitted,

JOHN T. RONAN, III
Tuxedo, New York 10987

H. EDWARD DUNKELBERGER, JR.
THEODORE L. GARRETT
COVINGTON & BURLING
888 Sixteenth Street, N.W.
Washington, D. C. 20006

Attorneys for Amicus Curiae

January 1976